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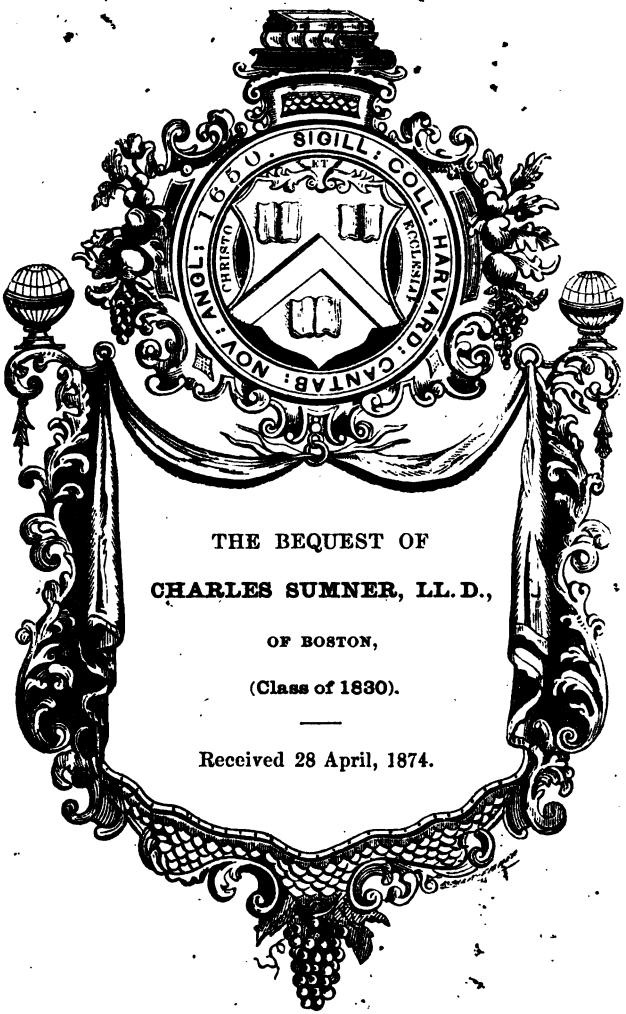
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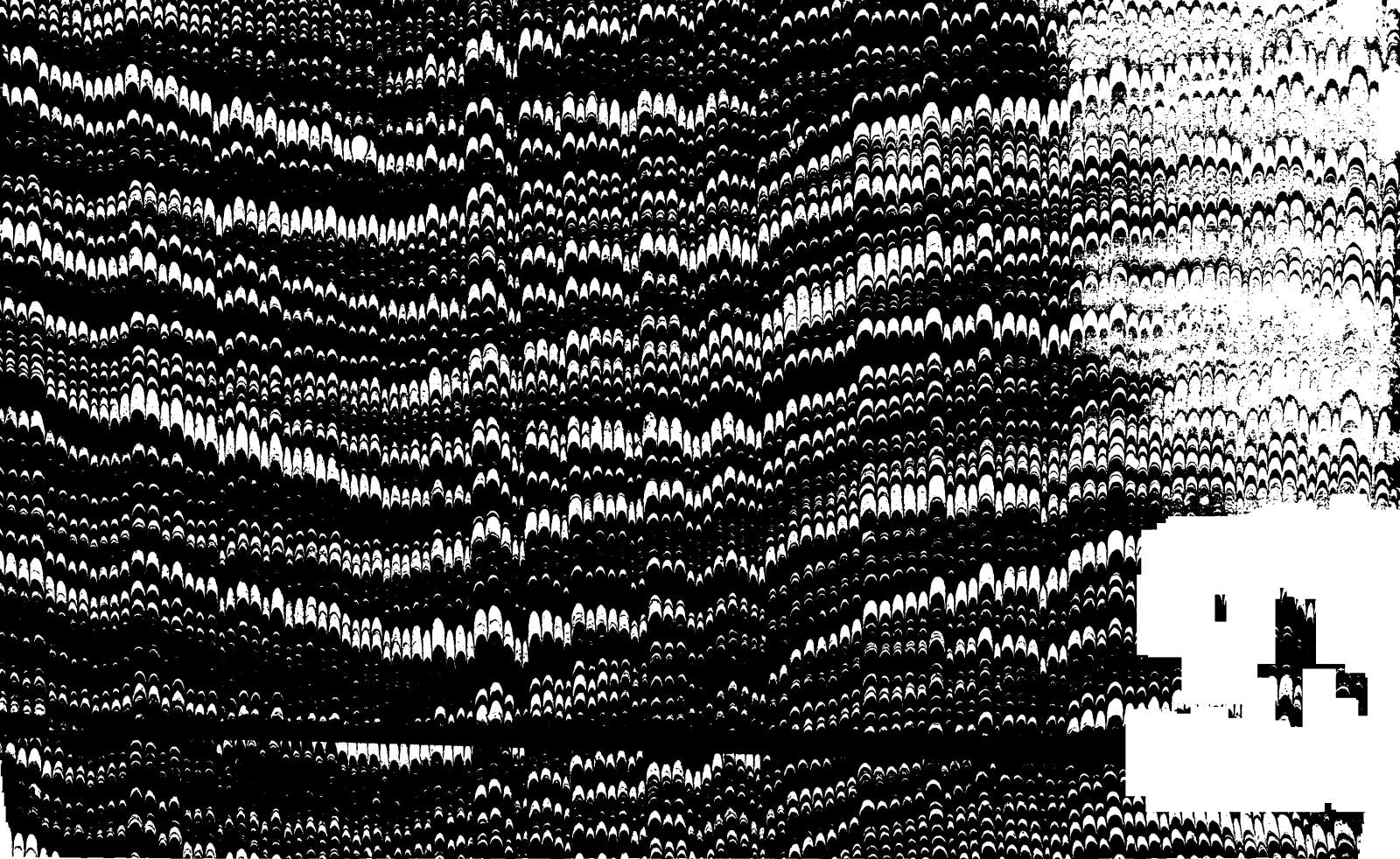
THE BEQUEST OF

CHARLES SUMNER, LL.D.,

OF BOSTON,

(Class of 1830).

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THE

LAWS OF WAR,

AFFECTING

COMMERCE AND SHIPPING.

BY

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BARRISTER-AT-LAW,

OF JESUS COLLEGE, CAMBRIDGE; AND THE INNER TEMPLE.

A NEW EDITION, ENLARGED,

WITH AN

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PREFACE TO THE SECOND EDITION.

The success which attended the publication of the First Edition of this Treatise, on "The Laws of War, affecting Commerce and Shipping," has confirmed the author's opinion of the utility of such a work; and its hearty acceptance by the mercantile world has induced him to add largely and materially to this edition. The general plan of the former work has not been departed from in the first portion of the present; and although a great number of fresh and popular topics have been here touched upon, the author has endeavoured to preserve (as far as was consistent with accuracy), that concise and popular character which he believes in no small degree contributed to the favourable reception of the first edition.

An Introduction has also been added, discussing the origin of the Laws of War generally, and the utility of the work has been enhanced by an Index for facilitating reference.

In a Second Part, which will shortly appear, the Author proposes to treat of the Laws of War relating to the Army, Navy, and the Militia, as well as the administration of the bodies governing those various sections of the war force of the country.

H. B. T.

8, Serjeant's Inn, Temple,
April 15, 1854.

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INTR

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defined. The Maritime Tribunals of maritime states always have been, and still are, almost the sole interpreters and mouthpieces of the International Law. Attempts that have been made by our own parliaments, by individual sovereigns, and even by congressional assemblies of the ministers of European powers, to create new universal laws, have been declared by these courts to be invalid, and of no authority. And though it is distinctly laid down, that the Law of Nations forms a part of the Common Law of England, yet

it is not subject to change by Act of Parliament, as other portions of the Common Law are; except so far as Parliament can change the form, constitution, and persons of the courts that declare the law.

Lord Stowell says "No British Act of Parliament, nor any commission founded upon it, can affect the rights or interests of foreigners, unless they are founded upon principles, and impose regulations, that are consistent with the Law of Nations." And in another place—"Much stress has been laid upon the solemn declaration of the eminent persons (the ministers of the European powers), assembled in Congress (at Vienna). Great as the reverence due to such authorities may be, they cannot, I think, be admitted to have the force of over-ruling the established course of the general Law of Nations."

It is to the Maritime Courts, then, of this and other countries, that the hopes of civilization must look for improvement and advance in the canons of international intercourse during the unhappy time of war. The manner, and the feeling in which they are to pronounce those canons cannot be more finely enunciated than in the words of Lord Stowell himself. "I consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the *Law of Nations* holds out, without distinction, to independent states, some happening to be neutral, and some belligerent.

"The seat of judicial authority is indeed locally *here* in the belligerent country, according to the known law and practice of nations; *but the law itself has no locality.* It is the duty of the person who sits here to determine this question exactly as he would determine the same question, if sitting at Stockholm; to assert no pretensions on the part of

Great Britain, which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to *Great Britain*, in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as UNIVERSAL LAW upon the question."

When an Admiralty Judge investigates the law in this impartial spirit, he occupies the grand position of being in some respects the director of the deeds of nations; but with equal certainty does the taint of an unjust bias poison all his authority; his judgments are powerful then only for evil; they bind no one beyond the country in which he sits, and may become the motive and origin of reprisal and attack upon his native land.

As the authority of the international judge depends on his integrity, so also does the universal law arise from, and remain supported by, the true principles of right and justice; in other words, by the fundamental distinction between right and wrong. A statute, a despotic prerogative, and an established principle of common law, rest upon different sanctions. They may be the causes of the greatest injustice, may sow the seeds of national ruin, and yet may even require revolutions for their reformation; but any one of the laws of nations preserves its vitality, only with the essential truth of its principles; a change in the feeling of mankind on the great question of real justice, destroys it, and it simply remains an historical record of departed opinion, or a point from which to date an advance or retreat in the career of the human mind.

It is for this reason that International Law has been so differently defined by writers at various periods.

The Law of Nations is *founded*, I have said, on the

general principles of right and justice, on the broad fundamental distinctions between right and wrong, or as Montesquieu defines it, "on the principle that nations ought in time of peace to do each as much good, and in time of war as little harm as possible." These are the principles from which any rule must be shown to spring, before it can be said to be a rule for international guidance. But what are the principles of right and wrong? These are not left to the individual reason of the interpreter of the law for the time being, but are to be decided by the *public opinion of the civilized world*, as it stands at the time when the case arises.

It may immediately be asked — How is that public opinion to be ascertained? The answer is—By ascertaining the *differences* in opinion between the present and the past. For this purpose it must be observed, that the views of a past age are easily ascertainable, in matters of law, from theoretical writings, history, and judicial decisions; and these views may be reduced to definition. Modern universal intelligence will either agree or disagree in these views. In the mass of instances it will agree, as progress on such points is at all times slow; and not only will the points of *disagreement* be few, but they will be salient, striking, and generally of popular notoriety. Present, universal, or international opinion, has therefore two portions. 1. That in which it accords with the views of a past generation, that has become historical. 2. That in which it differs from, or contradicts those views.

In the first instance, then, we are to ascertain what *were* the principles of right and justice, from any materials handed down to us; and if those principles agree with, or support the practical rules recorded by the same, or similar sources of information, such are to be accepted as belonging to the

code of the Laws of Nations, as far as those principles are uncontradicted by modern opinion.

In the second instance, those differences which may either overrule, add to, or complete the public opinion of a past age, are to be ascertained, (by those in whose hands such decisions rest,) by looking to the *wish* of nations on these points; and this wish may be exhibited in various ways; either by a universal abandonment of a given law, in its non-execution by any nation whatever, for a length of time; by numerous treaties, to obtain by convention an improvement not yet declared by international tribunals; or by extending to the relations and duties of nations, the improvements in the general principles of right and justice, that are at the time being applied to the concerns of private individuals.

The judges of such matters are not to ignore what is going on around them; all necessary knowledge is to be brought into court to discover what is the universal feeling of nations in respect of right and wrong, at the time they decide, and if they see a departure from the past sense of right and wrong, to make the modern, and not the ancient, the fountain of modern law; thence deducing the modern rules.

Because a precept cannot be found to be settled by the consent or practice of nations at one time, it is not to be concluded that it cannot be incorporated into the public code of nations, at some subsequent period. Nor is it to be admitted, that no precept belongs to the law of nations which is not *universally* recognised as such, by all civilized communities, or even by those constituting what may be called the Christian states of Europe. Some doctrines, which we, as well as the United States, admit to belong to the Law of Nations, are comparatively of recent origin and

application, and even at this period have received no public or general sanction in other nations; and yet, inasmuch as they are founded on a just view of the duties and rights of nations, according to a modern universal sense of what is just, they are enforced here as ascertained laws.*

By a similar train of reasoning, not only may the international tribunals of England enunciate new rules of law, as universal law, if founded and fairly deduced from ascertained modern, public, and international opinion; but they may refuse to alter settled rules, however much opposed by other nations, provided those rules are still deducible from that origin.

Generally, every doctrine fairly deduced, by correct reasoning, from the rights and duties of nations, and the nature of moral obligation, may be said to exist in the Law of Nations. Those rights, duties, and that moral obligation, are to be ascertained from the enunciation of them in past times, unless they have been relaxed, waived, or altered by universal modern opinion.

We may regard, then, the Law of Nations to be a system of political ethics; not reduced to a written code, but to be sought for, (not founded,) in the elementary writings of publicists, judicial precedents, and general usage and practice; but *continually* open to change and improvement; as the views of men in general, change or improve, with regard to the questions—What is right? What is just?

Now to apply the above to one example.

Undoubtedly up to the present time the system of granting Letters of Marque to the adventurers of a power friendly to the enemy, has received the sanction of the world. These buccaneering adventurers have, under the laws of war, when

* See Justice Story's Judgment in the Case of the La Jeune Eugenie. Life, Vol. i. 341.

taken, claimed and been allowed the rights of prisoners of war; have exercised all the privileges of regular privateers, and cast little or no responsibility on the countries they issued from, who still claimed to be entitled to the full position of neutral powers. Yet these unprincipled men differed from pirates in one respect only—that their infamous warfare was waged on one unhappy nation alone, instead of against the power of mankind. Uninfluenced by national feelings, their sole object was the plunder of the honest trader, and the means to that end—murder. Are there any modern principles of right and justice by which such persons are still to claim consideration? That there were such principles formerly, when the whole system of war was barbaric and unmereiful, cannot be doubted, unless such enemies were to be condemned when others equally bad were to be excused; but those reasons have now disappeared. Universal opinion is against these principles; numerous treaties have condemned the practice; the municipal laws of several states have made it punishable in their own subjects; America has even attempted, in two cases, to bring it in as piracy; and the highest authorities have pronounced it a crime.

Are not then the foundations of the laws that governed this case changed? It may be going too far to declare it piracy by the Law of Nations, but is it asking too much, in calling upon our maritime tribunals to proclaim the practice contrary to the Law of Nations; to deprive these privateers of the protection of neutrality, when in their native waters, and to subject the nation that permits them to fit out in, or issue from their ports, to the danger of reprisals, from the offended belligerents.

This I suggest as an example of the application of the principles of right and wrong, as at present understood, to

the investigation of the continued soundness of an accepted precept of law. In the judgments of Lord Stowell there are many such examples; and *guided* as he was by precedent and authority, he could not be said to have been *led* by anything but the principles of universal justice. At no time does he appear for a moment to have hesitated in putting aside precedent, when the true doctrine was unsatisfied. Mr. Justice Story acted on the same plan. The granting of salvage for the recapture of neutral property—the denial of the right of the Danish Government to confiscate private debts—the declaration of Mr. Justice Story, that the slave trade was against the law of nations—are a few amongst many remarkable examples of the fundamental principle being allowed to alter and overrule the authoritative precept.

THE

LAWS OF WAR.

PART I.

THE LAWS OF WAR AFFECTING COMMERCE AND SHIPPING.

CHAPTER I. COMMENCEMENT OF WAR.

SECTION I.

The Immediate Effects of War.

For some months the state of war that has been impending between Russia, and the Allied Powers,—England, France, and Turkey,—has now become actual; and though there have been many acts of preparation and precaution on the part of England and France, we have not been, up to the present crisis, engaged in what is termed by international writers, Public and Solemn War; such a position of affairs has at last arrived.

The War then, that England has entered into, is of the most Public and Solemn kind. Public War is divided into Perfect and Imperfect. The former is more usually Solemn War.

called Solemn. Grotius defines Public or Solemn War to be such Public War as is declared or proclaimed.

Imperfect Wars between nations, that is such wars as nations carry on one against the other, without declaring or proclaiming them, though they are Public Wars, are seldom called wars at all; they are more usually known by the name of reprisals, or acts of hostility. It has often been important to determine, on the re-settlement of peace, what time war commenced, and when reprisals ceased.*

According to the Law of Nations, two things are required for a Solemn War; first, it must be a Public War; that is, the contending parties must be two nations, or two parties of allied nations, contending by force under the direction of a supreme executive; and secondly, it must be proclaimed, notified, or declared. And probably it must be general in its character, and not simply local or defensive. Presuming that the coming contest will be of the widest character, I shall proceed to examine its legal effects on Commerce, on that supposition.†

Declaration of War.

Declarations of War have existed from the most ancient times, having been borrowed by modern nations from the manners and customs of the Romans. But in present times, (although they may be very properly put forward,) they are not necessary to a state of actual war, or as it is technically termed, to legalize hostilities. A Declaration of War is not a matter of international right.‡ Acts of hostilities, without such an instrument, cannot be denounced as irregular or piratical, unless committed in manifest bad faith. But though war may lawfully com-

* The Law of Reprisals; *Vide* note (A.)

† Rutherfurd's Institutes, vol. ii. p. 509.

‡ 2 Wheaton, p. 11; 1 Kent, p. 54.

mence without an actual declaration, yet a declaration is of sufficient force to create a state of war, without any mutual attack. It is not a mere challenge from one country to another, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also in a state of war, though, he may, perhaps, think proper to act on the defensive only.*

War, how commenced.

War now generally commences by Actual Hostilities, by the Recal or Dismissal of an Ambassador or Minister, or by a Manifesto published by one belligerent power to its own subjects.

Manifestoes are issued to fix the date of the commencement of hostilities; for as a state of war has many various effects on commercial transactions, such as the confiscation of certain property, and the dissolution of certain contracts, it is very necessary that such a date should be accurately known. When a Manifesto or Declaration is issued, it is said to legalize hostilities, that is to say,—to make all acts done, and all breaches committed, under pressure of war, good and lawful acts and breaches.

I have given this explanation, because it is a popular notion that a declaration always precedes war; but in reality, in modern times, few wars are solemnly declared;—they begin most often with general hostilities; thus the first Dutch War began upon general Letters of Marque, and the War with Spain, that commenced by the attempted invasion of the Armada in 1588, was not declared or proclaimed between the two crowns.†

Contents of Declaration.

The Manifesto not only announces the commencement and existence of hostilities, but also states the reasons of, and

* Per Sir W. Scott—Case of the Eliza Ann, 4 Rob. Adm. Rep. 247.

† Wildman's International Law, vol. ii. p. 5.

attempts the justification of the war; and it is necessary for the instruction and direction of the subjects of the belligerent state, with respect to their intercourse with the foe; it also apprizes neutral nations of the fact, and enables them to conform their conduct to the rights belonging to the new state of things.*

Without such an official act, it might be difficult to distinguish, in a Treaty of Peace, those acts which are to be accounted lawful effects of war, from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.

When war is duly declared, it is not merely a war between one government and another, but between nation and nation, between every individual of the one state with each and every individual of the other. The subjects of one country are all, and every one of them, the foes of every subject of the other, and from this principle flow many important consequences.†

Property of Subjects of Belligerent States in the Enemy's Country.

On the commencement of hostilities a natural expectation will arise that the Property, (if not the Persons) of the Belligerent State, found in the Enemy's Territory, will become liable to seizure and confiscation, especially as no declaration or notice of war is now necessary to legalize hostilities. According to strict authority, the Persons and Property of Subjects of the Enemy found in the belligerent state are liable to detention and confiscation; but even on this point diversity of opinion has arisen among institutional writers; and modern usage seems to exempt the Persons and Property of the Enemy found in either territory at the outbreak of the war, from its operations.

* 1 Kent, p. 54; Vattel, book 3, chap. iv. sec. 64.
† 1 Kent, p. 55.

Without entering on the long arguments that have been produced on this subject, and which it is not the intention of this treatise to reproduce, the rule may be stated very nearly as follows.*

That though, on principle, the property of the enemy is liable to seizure and confiscation, yet it is now an established international usage that such property found within the territory of the belligerent state, or debts due to its subjects by the government or individuals, *at the commencement* of hostilities, are not liable to be seized and confiscated as prize of war.

This rule is often enforced by treaty, but unless thus enforced it cannot be considered as an inflexible, though established, rule. This rule is a guide which the Sovran of the belligerent state follows or abandons at will, and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule, but depends on considerations which continually vary.†

Rule with respect to Immoveable Property.

The rule is different with respect to Immoveable Things, such as Landed Estates. He who declares war does not confiscate the Immoveable Estate possessed in his country by the enemy, but the Income may be sequestrated, to prevent its being remitted to the enemy.‡

Public Funds.

Public Funds, or in other words, debts due from the Sovran of the hostile state to Private Persons, are always held protected from confiscation, and there is only one instance in modern times where this rule has been broken. It is a

* 2 Wheaton, p. 12; 1 Kent, p. 55; Rutherfurd's Institutes, book 2, chap. 9, sec. 10.

† 2 Wheaton, p. 12—25; 1 Kent's Com. p. 55—6; Brown *v.* United States, 2 Cranch, 110; see also 228, 229.

‡ Idem.

matter of public faith; and even during war, no enquiry ought to be made whether any part of the public debt is due to the subjects of the enemy.*

Rule of Reciprocity.

All these rules are, however, subject to the Rule of Reciprocity. This is thus laid down by Sir William Scott, in the case of the Santa Cruz, "that at the commencement of a war, it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores. It is a principle sanctioned by that great foundation of the Law of England, *Magna Charta* itself, which perscribes, that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country."†

Droits of Admiralty.

‡ In England, at present, however, these liberal principles are modified by Rights of Admiralty, the foregoing rules being applied rather to property *upon the land* than *within the territory*; for although, when captures are made in ports, havens, or rivers, within the body of the country of the realm, the Admiralty is in reality excluded, yet Prize Courts have uniformly, without objection, tried all such captures in ports and havens within the realm; as in the case of ships not knowing hostilities, coming in by mistake, before the declaration of war or hostilities; all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made.§

Hostile Embargo.

This species of reprisal is termed a Hostile Embargo. It cannot well be distinguished from the practice of seizing

* Grot. book 3, chap. 20, sec. 16.

† 1 Rob. Adm. Rep. 64.

‡ 2 Wheaton, p. 19.

§ Lindo *v.* Rodney, Doug. 612; The Boedes Lust, 5 Rob. Rep. 233.

property found within the territory upon the declaration of war. It is undoubtedly against the spirit of modern liberality, and has been but too justly reprobated as destroying that protection to property which the rule of faith and justice gives it, when brought into the country in the course of trade, and in the confidence of peace.

It is not, however, as Wheaton states, peculiar to England, but common to modern Europe, except that England does not, in practice, appear to be influenced by the corresponding conduct of the enemy in that respect.*

Debts Due to and from an Enemy.

But with relation to Debts Due to an Enemy, previous to hostilities, English law follows a wiser principle.

On the outbreak of war between Denmark and this country in 1807, the Danish Government, as a measure of retaliation for the seizure of their ships in our ports, issued an ordinance sequestrating all debts due from Danish to British subjects, causing them to be paid into the Danish Royal Treasury.

The Court of King's Bench decided that this was not a legal defence to a suit in England for the debt, and that the ordinance was not conformable to the Law to Nations.† It was observed by the Court, that the right of confiscating debts (contended for on the authority of Vattel,)‡ was not recognised by Grotius,§ and was impugned by Puffendorf and others; and that no instance had occurred of the exercise of the right, (except the ordinance in question,) for upwards of a century. This is undoubtedly the law in England, although it may be doubted if this rule still holds so strongly in the United States.

* Per Lord Mansfield, Lindo *v.* Rodney.
† Wolff *v.* Oxholm, 6 M. and S. 92.
‡ Grot. book 2, chap. 18, sec. 344; book 3, chap. 5. sec. 77.
§ Whewell, Grot. vol. 3, p. 151, sec. 4; p. 165, sec. 4 (2).

Interruption of Intercourse; Trading with the Enemy unlawful.

One of the most immediate consequences of the outbreak of hostilities is the complete Interruption of Commercial Intercourse between the subjects of the countries at war, even to the extent of holding it unlawful, after war has begun, except under special licence of the government, to send a vessel to the enemy's country to bring home, with *their permission*, one's own property, when war has broken out.

There cannot exist at the same time a war for arms and a peace for commerce; from the very nature of war all commercial intercourse ceases between enemies. This interdiction of intercourse is the result of the mere operation of war; for declarations of war generally enjoin on every subject the duty of attack on the subjects of the hostile state, of seizing their goods, and doing them every harm in their power.*

From the very nature of war itself, all commercial intercourse ceases between enemies. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war as to commerce. Hence, commerce is alternately permitted and forbidden in time of war, as princes think it most for the interest of their subjects. A commercial nation is anxious to trade, and accommodate the laws of war to the greater or lesser want that it may have for the goods of the other. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandizes only, while others are prohibited; and sometimes it is prohibited altogether. In this manner there is partly peace and partly war, between subjects of both countries.†

* 1 Kent's Com. p. 65.

† Bynkersheok, Quæst. Sur. Pub. lib. i. cap. 3; 2 Wheaton, p. 26.

In the case of the Hoop,* Sir Wm. Scott says, "By the law and constitution of Great Britain, the Sovereign alone has the power of declaring War and Peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, when he sees proper, that commercial intercourse, which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient; but it is not for individuals to determine on the expediency of such occasions, on their own notions of commerce only, and possibly on grounds of private advantage not very reconcilable with the general interests of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. No principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy; and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchants should be compelled, in such a situation of the two countries, to carry on his trade between them, (if necessary,) under the eye and control of the Government charged with the care of public safety?"

Alien Enemy cannot sue in this country.

Sir William then goes on to say, "another principle of law, of a less politic nature, but equally general in its

* Robinson's Adm. Rep. p. 196.

reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at the time existing between the two countries, and that is the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of an Alien Enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio.* The peculiar law of our own country applies this principle with great rigour—the same principle is received in our Courts of the Law of nations; they are so far *British* courts, that no man can sue therein who is a subject of the Enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an Enemy, such as his coming under a flag of truce, a cartel, or a pass, or some other act of public authority that puts him in the Queen's peace *pro hac vice.* But otherwise he is totally *Ex lex!* Even in the case of ransom bills which were contracts, but contracts arising out of *the laws of war,* and tolerated as such, the Enemy was not permitted to sue *in his own person,* for the payment of the ransom bill; the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced is not a state of legal commerce."

No Trade permitted, except under Royal licence.

"Upon these and similar grounds, it has been the established rule of this court, confirmed by the judgment of the supreme court, that a trading with the enemy, except under a Royal Licence, subjects the property to confiscation.

"Where the Government has authorised, under sanction of an Act of Parliament, a *homeward trade* from the enemy's possessions, but has not specifically protected an *outward*

trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence, the rule has been enforced, where strong claim not merely of convenience, but almost of necessity, excused it on behalf of the individual.

"It has been enforced, where cargoes have been laden before the war, but where the parties have not used all possible dilligence to countermand the voyage after the first notice of hostilities.*

"In the last war between England and America, a case occurred in which an American citizen had purchased a quantity of goods within the British territory, a long time previous to the war, and had deposited them upon an island near the frontier; upon the breaking out of hostilities, his agents had hired a vessel to proceed to the spot, to bring away the goods; on her return she was captured, and with the cargo, condemned as prize of war."†

So also, where goods were purchased, some time before the war, by the agent of an American citizen in Great Britain, but not shipped until nearly a year after the declaration of hostilities, they were pronounced liable to confiscation. ‡

Where property is to be withdrawn from the country of the enemy, it is the more satisfactory and guarded proceeding on the part of the *British* merchant to apply to his own Government for the special importation of the article; it is indeed the only safe way in which parties can proceed.§

Subjects of an Ally may not trade with the Enemy.

During a Conjoint War no Subject of an Ally can trade with the common enemy without liability to forfeiture in the prize courts of the Ally, of all his property engaged in such

* The Hoop.

† The Rapid, 8 Cranche's Rep. p. 155.

‡ The St. Lawrence, 8 Cranche's Rep. p. 434.

§ The Juffrow Catharina, 5 Rob. 141.

trade. As the former rule can be relaxed only by permission of the Sovran power of the state, so this can be relaxed only by the permission of the allied nations, according to their mutual consent.*

Contracts void.

On similar principles, all Contracts made with the Enemy *during War* are utterly *void.* This applies to Insurances on the enemy's property and trade; to the drawing and negociation of Bills of Exchange, whether the subject of this country or of the alien enemy be the acceptor; to the sending of Money or Bills to the enemy's country; to Commercial Partnerships. All endeavours to trade by third persons are equally illegal.†

Thus also all Contracts made in contemplation of War, and which never could have existed at all, but as an insurance against the pressure of war, and with a view to evade the rights that arise out of war, and in fraud of the belligerent, are illegal, even though made by neutrals.‡

Insurances.

The municipal or common law of every state declares all Insurances to be void, by which ships or merchandize of the enemy are sought to be protected. Also all Insurances by or on behalf of *alien* enemies are wholly illegal and void, although effected before the breaking out of hostilities; but if both the policy had been effected and the loss accrued before the war, the remedy is only suspended during the war.

The general principle is that the contract of assurance is vacated and annulled *ab initio;* wherever an insurance is made on a voyage expressly prohibited by the common,

* 2 Wheaton, p. 37.

† 1 Kent's Com. p. 67.

‡ The Rendsborg, 4 Rob. Adm. Rep. 132.

statute, or maritime law of the country; the policy is of no effect.*

Thus, if a ship, though neutral, be insured on a voyage prohibited by an embargo laid on in time of war, by the prince of the country in whose ports the ships happen to be, such an insurance is void.†

Similarly, all Insurances to protect the interests of British subjects trading without licence with the enemy are absolutely void.‡

So also, if a Licence is not strictly pursued, so that the voyage becomes illegal, the insurance is void.§

I have said that all Insurances will be void which are designed to protect voyages or trading to hostile ports. But, for this purpose, it must be clearly made out, not only that the port into which the ship sails is hostile, but also, that she was bound with a distinct hostile destination at the time of loss. Thus a policy to "ports in the Baltic," is legal, as some may be hostile, and some not, and it is not certain that she was sailing to a hostile port.

The general principle by which the validity of a policy is to be tested, is by the voyage, that it is a voyage prohibited by law, on some ground of public policy. The will, therefore, of the parties is of no account, as the prohibition is for public, and not private benefit. So that if the underwriter is told that the voyage is illicit he is not more bound than if he were not told so.‖

It is Insurances upon voyages generally prohibited by by law, such as to an enemy's garrison, or upon a voyage directly contrary to an express act of parliament, or to

* Park, p. 497.
† Toulmin *v.* Anderson, 1 Taunt. 227.
‡ Potter *v.* Bell, T. Rep. 548; The Hoop, *supra.*
§ Vandyck *v.* Whitmore, 1 East, 475.
‖ Park, 502.

royal proclamation in time of War, that are absolutely void and null;—therefore, on neutral vesssels, or the vessels of British subjects possessing neutral rights and sailing from neutral ports to enemies ports are not void.*

Similarly, with respect to Insurances on neutral vessels carrying contraband goods, for it is not the voyage, but the cargo, that is illegal in that case.†

Insurances are good on Neutral Vessels engaged in the Colonial Trade of the Enemy, and which was closed to the Neutral in time of peace,‡ It must be observed, that if a voyage is illegal, and voids the policy for that voyage, it does not follow that it voids the voyage in the opposite direction, and even the goods purchased by the proceeds of a former illegal voyage, may be the subject of Insurance.§

Bills of Exchange drawn during War.

It has been stated above that all Bills drawn or negociated with the enemy, whether a British subject or the alien enemy be the acceptor, are null and void; during the last war, however, attempts were often made to draw and negociate bills that should pass muster in our courts of law, as for example:—

An alien enemy, during war, drew upon a British subject resident in England, and who had funds of the alien in his hands; the drawer then indorsed the bill to an English-born subject, resident in the hostile country; such a bill cannot be enforced even after the restoration of peace, for otherwise it would enable alien enemies to take the benefit of all their property in this country, by allowing them to pay debts out of such funds, by the instrumentality of bills.‖

* Park on Insurance; Arnold on Insurance; Gist *v.* Mason, 1 T. R. 84.

† Idem. ‡ The Immanuel, 2 Rob. Adm. Rep. 198.

§ Park, 502; Sewell *v.* Royal Exchange Assurance Co. 4 Taunt. 856; Wilson *v.* Marryat, 8 T. Rep. 31.

‖ Willison *v.* Patterson, 7 Taunt. 439; *Vide* Note on the War Bill Act, at the end of this part.

The principle seems to be,—that it is not every bill that bears the name of an alien enemy upon it that is void, but such bills only that are instrumental in assisting in communication with an alien enemy;—and a liberal application of this principle has been made use of to open a way for English prisoners to make use of their property at home for their support in the country of their captivity. Thus, where one of two Englishmen, detained in France on the breaking out of hostilities, drew in favour of the other, upon a subject here, it was held that he might legally draw such a bill for his *subsistence*, and that he might indorse it to an alien enemy, an inhabitant of the hostile country; for he could not avail himself of the bill except by negociation; and to whom could he negociate it, except to the inhabitants of the country in which he resided?*

Bills, like other contracts, are only void by the policy of war; but the law still recognizes some extent of obligation between the parties, so that bills void in their concoction (as instruments of trade with the enemy,) are not so far void that they may not constitute the basis of a promise by which a party may bind himself on the return of peace.†

Contracts made before the War.

On the very important question of the effect of a declaration on Contracts with the subjects of the enemy, *entered into previous to the War*, the rule is, that if the performance of the contract be rendered unlawful by the Government of the country, the contract is dissolved on both sides.‡

* Per Gibbs, C. J. Antoine *v.* Morshead, 6 Taunt. 238. According to Mr. Serjeant Byles, a bill drawn by a British prisoner in favour of an alien enemy cannot be enforced by the payee. He cites no case in support of this assertion; but on the principle of the last case cited, if it were drawn for *subsistence and not for trade*, there seems to be no reason why it should not be legal.

† Duhamel *v.* Pickering, 2 Starkie, 92.

‡ Barker *v.* Hodgson, 3 M. & S. 270.

Thus the contract of Affreightment is dissolved when the voyage becomes unlawful, by the commencement of war, or the interdiction of commerce;* and this whether the interdiction is complete as to the ship, or partial as to the receiving of goods.

Similarly, if the voyage be broken up by Capture on the passage, so as to cause a *complete defeat* of the undertaking, the contract is dissolved, notwithstanding a recapture.†

A Blockade of the port of destination, that renders the delivery of the cargo impossible, and obliges the ship to return to its port of destination, dissolves the contract.‡

A temporary interruption of the voyage does not put an end to the agreement. Embargoes, hostile blockades, and investments of the port of departure are held to be temporary impediments only.§

But in the case of an Embargo imposed by the government of the country, of which the merchant is a subject, in the nature of reprisals and partial hostility, against the enemy to which the ship belongs, the merchant may put an end to the contract, if the object of the voyage is likely to be defeated thereby; as if, for example, the cargo were of a perishable nature.‖

Partnerships.

A Public War operates as a positive dissolution of Partnerships between subjects of the contending nations. Every Partnership is dissolved by the extinction of the business for which it was formed.¶ By a declaration of War, the respective subjects of each country become

* Liddard *v.* Lopes, 10 East. 526; Abbot, on Shipping, 596.
† 1 Kent's Com. 248; The Hiram, 3 Rob. Adm. 189.
‡ 1 Kent's Com., 249.
§ Hadley *v.* Clarke, 8 T. R. 259; 3 Kent's Com. 249.
‖ Abbot, on Shipping, 599.
¶ Pothier, Trait du Cout. de Joc. No. 140.

positive enemies to each other. They can carry on no commercial or other intercourse with each other; they can make no valid contracts with each other; they can institute no suits in the courts of either country; they can, properly speaking, hold no communication of an amicable nature, with each other; and their property is mutually liable to capture and confiscation by the subjects of the other country. The whole objects and ends of the Partnership, the application of the joint funds, skill, labour, and enterprize of all the Partners of the common business, can no longer be attained.*

Thus a Partnership between alien friends, is at once defeated when they become alien enemies.

This dissolution, however, only has respect to the future. The parties remain bound for all antecedent engagements. The partnership may be said to continue as to everything that is past, and until all pre-existing matters are wound up and settled. With regard to things past, the partnership continues, and must always continue.

No notice is necessary to the world to complete the dissolution of the association. Notice is requisite when a partnership is dissolved by the act of the parties, but it is not necessary when the dissolution takes place by the act of law. All mankind are bound to take notice of the War, and its consequences. Besides, any special notice would be useless unless joint, and as the partners could hold no lawful intercourse, a lawful joint notice is impossible.

It must not be supposed that peace will have any healing effect, to restore the parties to their rights; the co-partnership being once dissolved by the war, it was extinguished for ever, except as to matters existing prior to the war.†

* Story, on Partnership, pp. 447, 448.

† Griswold *v.* Waddington, 16 Johns. Rep. U. S.

With regard to the effect of war upon partnerships, where the partners are severally subjects of the belligerent powers. According to Mr. Justice Story, "this point does not seem to have been discussed in our courts of justice until a recent period; yet it would seem to be be a necessary result of principles of public law, well established and defined. By a declaration of war, the respective subjects of each country become positive enemies of each other. They can carry on no commercial or other intercourse with each other; they can make no valid contracts with each other; they can institute no suits in the courts of either country; they can, properly speaking, hold no communication of an amicable nature with each other; and their property is mutually liable to capture and confiscation, by the subjects of either country. Now, it is obvious from these considerations, that the whole ends and objects of the partnership, the application of the joint funds, skill, labours, and enterprize, of all the partners in the common business thereof, can no longer be attained. The conclusion therefore, would seem to be absolutely that this mutual supervening capacity, must, upon the very principles applied to all analagous cases, amount to a positive dissolution of the partnership."*

The law of nations has not even stopped at the points already stated; it proceeds further. The question of enemy or no enemy, depends not upon the natural allegiance of the partners, but upon their domicil.

Partnerships.

If a partnership is established, and as it were domiciled, in a neutral country, and all the partners reside there, it is treated as a neutral establishment, and is entitled to protection accordingly. But if one or more of the partners is

* Story, on Partnership, 447.

domiciled in an enemy's country, he or they are treated personally as enemies, and his share of the partnership property is liable to capture and condemnation accordingly, even though the partnership establishment is in the neutral country. The inference from these considerations is, that in all these cases there is an utter incompatibility from operation of law between the partners, as to their respective rights, duties, and obligations, both public and private; and therefore, that a dissolution must necessarily result therefrom, independent of the will or acts of the parties.*

And, as a general rule, therefore, it may be laid down, that if the performance of a covenant be rendered unlawful by the Government of this country entering into war, the contract will be dissolved on both sides, and the offending party, as he has been compelled to abandon his contract, will be excused from the payment of damages for its non-performance; but it is otherwise, if the non-performance is prevented only by the prohibition of a foreign country.†

In such cases, the remedy only is suspended; and other cases may occur on these principles, where, from other circumstances, the remedy only is suspended until the termination of the war; as for example, in most cases of executed contracts.

Trading with the Enemy, was at an early period an indictable offence in the English Court of Admiralty.‡ And in the time of King William, it was held to be a misdeamenor at common law, to carry corn to an enemy.§

Trading with the Enemy punishable.

* Story, on Partnership, 449; Griswold *v.* Waddington, 15 Johns, 57; 16 Johns, 438.

† Platt, on Covenants, 588; Doe *d.* Lord Anglesea *v.* Ch. Wardens of Rugely, 6 Q. B. 113, and cases there cited.

‡ Cosmopolite, 4 Rob. 10, 11, in note.

§ 1 Term. R. Gist. *v.* Mason.

The law, as I have faintly sketched it out, is founded to some extent on American authorities, where the question has been as fully discussed as in the reports of this country; but there can be little doubt that the law is the same in this country: although a doubt was once thrown on it, by the strong political opinion of Lord Mansfield, as to the policy of allowing trade with an enemy, or assuring an enemy's property. The lustre of his talents, and his ascendancy in the Court of King's Bench, were calculated to continue the delusion. During his time, the question as to the *legality* of such insurances was never mooted; for he frowned on every attempt to set up such a defence, as dishonest and against good faith.*

The strict rule of interdicted intercourse has been carried so far in the British Admiralty, as to prohibit supplies to a British Colony during its partial subjection to the enemy, and when the Colony was in want of provisions.†

Cartel Ships.

The same interdiction to trade applies to Cartel Ships, or Ships of Truce, that is, to Ships sent to recover prisoners of war; and there is but one exception to this rigorous rule of International Law;—the case of Ransom Bills, which are contracts of necessity, founded on a state of war.

* Per Buller, J. Bell *v.* Gilson, 1 Bos. *v.* Pull.

† Case of Bella Guidita, cited 1 Rob. Adm. Rep. 207.

Section II.

On Enemies and Hostile Property.

During a peace of thirty-nine years, there has naturally arisen a vast inter-immigration throughout Europe; many complicated commercial and family relations have sprung up between nations of different countries; many Englishmen are permanently settled in various parts of Europe; and England, in return, is crowded with Foreigners, who look upon this country as their present and future home. What is the position of these persons at the commencement of war? Who, in fact, are our enemies?

And the previous Section, in which the effect of War on Commercial Relations has been sketched out, must have made it quite evident that it has become important accurately to determine what relations and circumstances impress a hostile character upon persons and property. According to Chancellor Kent, "the modern International Law of the Commercial World is replete with refined and complicated distinctions on this point."

Alien Enemies.

A man is said to be permanently an Alien Enemy, when he owes a permanent allegiance to the adverse belligerent, and his hostility is commensurate in point of time with his country's quarrel. But he who does not owe a permanent allegiance to the enemy, is an enemy only during the existence and continuance of certain circumstances.*

The character of enemy arises from the party being in

* 1 Kent, p. 73

what the law looks upon as a state of allegiance to the state at war with us; if the allegiance is permanent (as in the case of a natural-born subject of the hostile Sovran), the character is permanent.

But with respect to the man who is an alien enemy from what he does under a local or temporary allegiance to a power at war with us—when the allegiance ends, the character of alien enemy ceases to exist.*

Of course all persons owing a natural allegiance to the enemy are our enemies; but on the same broad principles of natural justice that impress a temporary character upon our friends and fellow countrymen, under special circumstances individuals from amongst our natural enemies become our friends and fellow subjects.

Prisoners of War.

The first among these are Prisoners of War.

A Prisoner of War is *not* adhering to the King's enemies, for he is here under the protection from the King. If he conspires against the King's life it is high treason; if he is killed (malice aforethought), it is murder. He is not, therefore, in a state of actual hostility. At one time it was ruled, that a prisoner of war could not contract; but that case was thought hard. Officers on their parole must subsist like other men of their own rank; but if they could not contract they must starve; for they could gain no credit if deprived of the power of sueing for their own debts. A prisoner in confinement is protected as to his person, and if on parole he has protection in his credit also.†

He is allowed to support himself, and add to his personal comfort, by applying himself in his trade or business, and may maintain an action on his contract for his wages; nor

* Per Eyre, C. J. Sparenburgh *v.* Bannatyne, 1 B. & P. 168.

† Sparenburgh *v.* Bannatyne, 1 B. & P. 163.

can he be compelled, when sueing for money necessary for his support, to give security for costs like any other foreigner temporarily resident in this country.*

Married Foreigners.

A wife generally follows the country and allegiance of her husband; but where she is in this country of necessity, or is here owing allegiance by her birth, and her husband is an alien enemy and under an absolute disability to come and live here, the law steps in to her aid, and gives her the privileges of an unmarried woman, so that she may sue and be sued, and make contracts for and against herself, for her maintenance. "Her case," says Chief Justice Holt, "does not differ from that of those ladies who were allowed to sue and be sued upon the adjuration or banishments of their lords, as if they had been sole."†

Foreign ladies, who have married Englishmen, are, by their marriage, naturalized, and have all the rights, privileges, and duties, of natural-born subjects, and cease to be enemies.‡

Enemies by Hostility.

A hostile character may be acquired by alien friends, by acts of actual hostility, and by alien friends and our fellow-subjects also, by what are termed personal and commercial domicil. Of course a British subject in actual hostility to his native country is more than enemy, he is a traitor, and has no belligerent rights; but an alien friend, that is a neutral engaging in war against this country, under the commission of a foreign prince, and in the ranks of a hostile army, or on board a legally commissioned enemy's vessel, is an enemy, and has all the rights of a prisoner of war, if taken.

* Maria *v.* Hall, 2 B. & P. 236.

† Derry *v.* Duchess of Mazarin, 1 Taunt. 147.

‡ 7 & 8 Vic. c. 66, sec. 16; Mrs. Manning's Case, 2 D. C. C. 468.

Mariners. A Mariner, by a general rule, takes the character of the country in whose service he is employed, and even fugitive visits to the place of his birth will not entitle him to retain the benefit of a neutral character, in opposition to a regular course of employment in the enemy's country and trade; nor does the fact of his wife and family residing in his own country enable him to retain his native character.*

Domicil, Test of Nationality. With the exception of these special cases, in a state of war, Domicil is the Test of Nationality. According to Grotius, "By the Law of Nations all the subjects of the offending state, who are such from a *permanent* cause, whether natives *or emigrants from another country*, are liable to reprisals; but not so those who are only travelling or sojourning for a little." And he even holds that the right of killing and doing bodily harm to enemies extends "not only to those who bear arms, or are subjects of the author of the war, but to *all* those who are found in the enemy's territory;" meaning all those found domiciled or adhering to the enemy.

If, then, a native of England resides in a belligerent country, his property is liable to capture as enemy's property; and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences of the neutral trade.†

He takes all the advantages and disadvantages of the country of his adoption; with the limitation, that he must do nothing inconsistent with his native allegiance;‡ as, for example, if he emigrate to a neutral country *during the time of war*, he will not be permitted to acquire the character of

* The Vriendchap, 6 Rob. 166; the Embden, 1 Rob. 17; the Endraught, 1 Rob. 23.

† Kent's Com. vol. i. 74.

‡ Case of the Emmanuel, 1 Rob. Adm. Rep. 302.

a neutral merchant, and trade with the enemy in that character, it being his duty to injure the enemy to the full extent of his power.*

In determining the important question of Domicil, the *animus manendi*, or disposition to remain or settle in the land of the domicil, is the question to be determined. Test of Domicil.

If a man goes into a foreign country upon a visit, to travel for health, to settle a particular business, or for similar purposes, the residence naturally attendant on these circumstances is not generally regarded as a permanent residence.

But though a special purpose, such as the above, does not fix a domicil, yet these circumstances are not to be taken without respect to the *time* they *may probably* or *actually do* occupy. A general residence may grow upon a special purpose. It is difficult to fix the amount of time necessary to create a domicil, and it probably must be determined from each particular case. Thus, if a man remained in a hostile state after the outbreak, employed on some great work, which would occupy him many years, or beyond the probable termination of the war, or were unable to leave that particular climate on account of health, or were under any disability to return to his native country, the amount of time he had resided there would become an element of the question; against such a residence, the plea of an original special purpose, could not be averred; but it must be inferred, in such a case, that other purposes forced themselves upon him, mixed themselves with his original design, and impressed upon him the character of the country where he resided.

But, as an exception, a residence involuntary or con-

* Case of Dos Hermanos, 2 Wheaton, 76.

strained, however long, does not change the original character of the party, and give him a new and hostile one.

Domicil is fixed by a disclosed intention of permanent residence; if the emigrant employs his person, his life, his industry, for the benefit of the state under whose protection he lives; and if, war breaking out, he continues to reside there, pays his proportion of taxes, imposts, and revenues, equally with the natural-born subjects, no doubt he may be said to be domiciled in that country.

When these circumstances are ascertained, time ceases to be an element in the question, and the *animus manendi*, once ascertained, the recency of the establishment, though it may have been for a day only, is immaterial.

The intention is the real subject of enquiry; and the residence, once the domicil, is not changed by periodical absence, or even by occasional visits to the native country, if the intention of foreign domicil remains.

The native character, however, easily reverts; more so in the case of a native subject, than of one who is originally of another country. The moment an emigrant turns his back on his adopted country, with the intention of returning to (not simply visiting) his native country, he is in the act of resuming his original character, and must be again considered as a citizen of his native land;* even if he is forcibly detained in the country he is parting from, as was the case with British subjects on the breaking out of the War of 1804.†

But it is advisable for persons so situated, on their intended removal, to make application to Government for a special pass, rather than to trust valuable property to the

* 1 Wheaton, 46; Rob. Adm. Rep. iii. 324; the Harmony, the Indian Chief, 3 Rob. 12.

† The Ocean, 5 Rob. p. 91.

effect of a mere intention to remove, dubious as that intention may frequently appear, under the circumstances that prevent that act from being carried into execution.

But, as we have before observed, general principles on this subject are scarcely sufficient; the right of domicil must depend on each individual case. If no express declaration has been made, and the secret intention has yet to be discovered, it can be evidenced by the acts of the party. In the first instance, these acts are removal to a foreign country, settlement there, and engagement in the trade of the country: and if a state of war brings his national character into question, it lies on him to explain the circumstances of his residence.

Domicil in Eastern Countries.

A singular exception exists in reference to the rule of domicil. In the Western parts of Europe, alien merchants mix in the society of the natives; but in the East, from almost the oldest times, an immixable character has been kept up; foreigners continue strangers and sojourners, as all their fathers were. Merchants residing in these countries are hence still considered British subjects.

Hostile character acquired by Trade.

Again, a National Character may be acquire by Trade, or, as it is called, by *commercial domicil.* In general, the national character of a person, as neutral or enemy, is determined by that of his domicil; but the property of a person may acquire a hostile character independently of his personal national character derived from personal domicil. A person carrying on trade habitually in the country of the enemy, though not personally resident there, should have time given him to withdraw from that commerce; it would press too heavily on neutrals to say, that immediately on the first breaking out of a war, their

goods should become subject to confiscation. But if a person enters into a house of trade in the enemy's country, in time of war, or continued that connexion during the war, he cannot protect himself by mere residence in a neutral country. "It is a *doctrine* supported by strong principles and equity," says Sir William Scott, "*that there is a traffic which stamps a National Character* on the individual, independent of *that Character* which *mere personal residence* may give him.* The principle does not go to the extent of saying that a man, having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belong to his belligerent domicil.†

His lawful trade is exonerated from the operation of his unlawful trade, in all cases, and under all phases. All trade that does not originate from the belligerent country is protected, but not so, if it can be traced so to arise in not too remote a degree.

The same protection however is not extended to the case of a merchant residing in the hostile country, and having a share of a house of trade in an enemy's country. Residence in a neutral country will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country.‡

Rule of 1756. The next mode in which a hostile character may be given to those not naturally bearing it, is by dealing in those branches of commerce which are confined in the time of

* The Vigilantia, 1 Rob. Adm. Rep. p. 1.

† The Susa, Rob. Adm. Rep. vol. ii. p. 255.

‡ Wheaton, vol. ii. p. 71, citing Cranch's Rep. vol viii. p. 253.

peace to the subjects of the enemy: *i.e.* the ships and cargoes of a Neutral engaged in the colonial or coasting trade of the enemy (not open to foreigners in time of peace), are liable to the penal consequences of confiscation. This point was first mooted in the war of 1756, and is called the rule of 1756.*

National Character of Ships.

When there is nothing particular or special in the conduct of the vessel itself, the national character is determined by the Residence of the Owner; but there may be circumstances arising from that conduct which will lead to a contrary conclusion. It is a known and established rule with respect to a vessel, that if she is navigating under the pass of a foreign country, she is considered as bearing the national character of the nation under whose pass she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country. In like manner, and on similar principles, if a vessel, purchased in the enemy's country, is by constant and habitual occupation continually employed in the trade of that country, commencing with the war, continuing during the war, and evidently on account of the war, that vessel is deemed a ship of the country from which she is so navigating, in the same manner as if she evidently belonged to the inhabitants of it.† Further, when parties agree to take the pass and flag of another country, they are not permitted, in case any inconvenience should afterwards arise, to aver against the flag and pass to which they have attached themselves, and to claim the benefit of their real character. They are likewise subject to this further inconvenience, that their own real character may be pleaded against them by others. Such is

* 1 Kent's Com. 82, citing Berens *v.* Rucker, 1 W. Bl. 313; and *vide infra* Chap. iii. under title "Rule of 1756."

† The Vigilantia, 1 Rob. Adm. Rep. 15.

the state of double disadvantage to which persons expose themselves by assuming the flag and pass of a foreign state.*

Distinction as to Cargoes.

A distinction is made in England between the Ship and the Cargo. Some countries have gone so far as to make the flag and pass conclusive on the cargo also; but in England it is held that goods have no dependence upon the authority of the state, and may be differently considered. If the cargo is laden in time of peace, though documented as foreign property, in the same manner as the ship, the sailing under a foreign flag and pass has not been held conclusive as to the cargo.†

Hostile Property cannot be Transferred *in Transitu.*

Property which has a hostile character at the commencement of a voyage, cannot change that character by assignment while it is *in transitu*, so as to protect it from capture.‡

In the ordinary course of things, in the time of peace, such a transfer *in transitu* can certainly be made. When war intervenes, another rule is set up by the Courts of Admiralty, which interferes with the ordinary practice. In a state of war, *existing* or *imminent*, it is held that the property shall be deemed to continue as it was at the time of shipment, till actual delivery; this arises out of a state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in an enemy's country would be protected by transfers, which it would be impossible to detect.§

* The Success, 1 Dodson's Adm. Rep. 132.
† 1 Kent's Com., p. 85.
‡ 1 Kent's Com. p. 85.
§ Vrow Margaretha, 1 Rob. Adm. Rep. 338.

CHAPTER II.

SECTION I.

Actual War.—Its Effects.

Objects of War.

Vattel tells us "The end of a just war is to *avenge or prevent injury;* that is to say, to obtain justice by force, when not obtainable by any other method; to compel an unjust adversary to repair an injury already done, or to give us securities against any wrong with which we are threatened by him. As soon therefore as we have declared war, we have a right to do against the enemy whatever we find necessary for the attainment of that end, for the purpose of bringing him to reason, and obtaining justice and security from him."

"The lawfulness of the end does not give us any thing further than barely the means necessary for the attainment of that end. Whatever we do beyond that, is reprobated by the law of nature—is faulty and condemnable at the tribunal of conscience. Hence it is that the right to such acts varies according to circumstance. What is just and perfectly innocent in one situation is not always so on other occasions. Right goes hand in hand with necessity and the exigency of the case, but never exceeds them."

Such are some of the arguments that Vattel puts forth

with all the strength of reason and eloquence, against all unnecessary cruelty, and all mean and perfidious warfare.

There was no limit to the career of violence and destruction, justified by some of the earlier writers; they considered a state of war as a dissolution of all moral ties, and a licence for every disorder and fierceness: even such authors as Bynkershoek and Wolff, who lived in the most learned and not the least civilized nations of Europe, and were the contemporaries of that galaxy of talent that adorned the commencement of the eighteenth century, held that every thing done against an enemy was lawful. He might be destroyed, though unarmed, harmless, defenceless; fraud, even poison, might be used against him. A foe was a criminal and an outlaw, who had forfeited his rights, and whose life, liberty, and property, lay at the mercy of the victor.

But such was not the public opinion or practice of enlightened Europe at the time they wrote. Grotius had long before, even in opposition to his own authorities, but influenced by religion and humanity, mentioned that many things were not fit and commendable, though they might be strictly lawful. He held that the Law of Nations prohibited the use of poisoned arms, the employment of assassins, violence to women or the dead, or making slaves of prisoners. Montesquieu followed in the same humane spirit. He writes, that the civilians said, "That the law of nations, to prevent prisoners being put to death, has allowed them to be made slaves. * * * The reasons of the civilians are all false. It is false, that killing in war is lawful, unless in case of absolute necessity; but when a man has made another his slave, he cannot be said to be under a necessity of taking away his life, since he actually did not take it away. War gives no other right over prisoners than to disable them

from doing any further harm, by securing their persons. All nations concur in detesting the murdering of prisoners in cold blood." *

Thus, it is now the established Law of Nations, that necessity is the measure of violence in war, and humanity, its tempering spirit; or, as it has been otherwise enunciated, the rights of war are to be measured by the objects of the war.

Although we have a right to kill our enemies in war; it is only when we find gentler methods insufficient to conquer their resistance and bring them to terms, that we have a right to put them to death. †

Under the name of enemies are comprehended not only the first author of the war, but also those who join him and support his cause.

Cartel.

Out of these enlightened views of war has sprung the System of Cartels for the exchange of prisoners. These exchanges are generally regulated by special convention between the hostile states. Prisoners are sometimes permitted to return home, upon condition not to serve again during the war, or until duly exchanged. Officers are frequently released upon their parole, on the same condition; and to carry more effectually into operation the arrangements necessary for these purposes, commissaries are permitted to reside in the respective hostile states.

Subject to the principle of non-resistance, there are several classes of persons that are generally considered exempt from the operations of war, beyond the effects of unavoidable accident. "All the members of the enemy's state," says Wheaton, "may lawfully be treated as enemies,

* Esprit des Loix, book 15, c. 2.
† Vattel, Idem.

in a Public War; but it does not follow that all are to be treated alike; though we may lawfully destroy some of them, it does not follow that we may lawfully destroy all; for the general rule derived from the natural law is still the same, that no force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilised nations founded on this principle, has therefore exempted the persons of the Sovran and his family, the members of the Civil Government, women and children, cultivators of the earth, artizans, labourers, merchants, men of science and letters, and generally all other public or private persons engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity."*

The same principle of moderation towards that which is non-resisting limits and restrains the operations of war against the territory and other property of the enemy. There is a marked difference in the rights of war carried on by land and at sea, in modification of the general right to seize on *all* the enemy's property, and to appropriate that property to the captors.

Objects of a Maritime War.

The object of a Maritime War is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of *private* property is necessary to that end, and is allowed in maritime wars, by the practice and law of nations.

Private Property on Land.

But *private property on land* is exempt from confiscation, with the exception of such as may become booty

* Wheaton, vol. 2, p. 79.

in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to an absolute and unqualified conquest of an enemy's country. In ancient times, both real and personal property of the vanquished passed to the victors; but the last example of confiscation and partition among the conquerors in Europe, was that of England, by William of Normandy.

Unless in special cases, private property on land is not touched, without making compensation; though contributions are sometimes levied in lieu of a necessary confiscation, or for the expenses of maintaining and affording protection. In other respects private rights are unaffected by war.

Government Property.

The property, however, belonging to the Government of the vanquished nation, passes to the victorious state, which also takes the place of the former Sovereign, in respect to the eminent domain.*

Limitations of the Right of making War.

The right of making War, as we have shown in the first chapter of this book, solely belongs to the Sovran power. Subjects cannot, therefore, of themselves, take any step in the affair; nor are they allowed to commit any act of hostility without orders from their Sovran.

The Sovran's order which commands acts of hostility, is either general or particular. The declaration of war, which enjoins the subjects to attack the enemy's subjects, implies a general order. Generals, officers, soldiers, privateersmen, and partisans, being all commissioned by the Sovran, make war by virtue of a particular order.

In declarations of war, the ancient form is still retained,†

* Wheaton, vol. 2, p. 8; Kent, vol. 1, p. 91.

† Not so, however, in the late Declaration, March 28, 1854; *sed vide* App.

by which subjects in general are ordered, not only to break off all intercourse with, but also to *attack* the foe. Custom interprets this general order. It authorises, indeed, and even obliges every subject, of whatever rank, to secure the persons and things belonging to the enemy, when they fall into his hands; but it does not invite the subject to undertake any offensive expedition without a commission or particular order.*

Section II.

Prizes and Privateers.

Privateer Commissions.

During the lawless confusion of the feudal ages, the right of making Reprisals was claimed and exercised, without a Public Commission. It was not until the fifteenth century that Commissions were held necessary, and were issued to private subjects in time of war, and that subjects were forbidden to fit out vessels to cruise against enemies without licence. There were ordinances in Germany, France, Spain, and England, to that effect.†

Non-Commissioned Captors.

Hostilities, without a Commission, are contrary to usage, and exceedingly irregular and dangerous, but they are not considered as acts of Piracy during the time of war. Non-commissioned vessels of a belligerent nation may at all times capture hostile ships, without being deemed, by the Law of Nations, Pirates. But they have no interest in the prizes

* Vattel, book 3, chap. 15.

† Kent, vol. 1, sec. 5, p. 94.

they take, and the property so seized is condemned to the Government as *Droits of the Admiralty*. The reward of this class of captors is left to the liberality of the Admiralty, and is often referred to the Admiralty Court.

Right of Capture.

The fruits of any forcible detention or occupancy, prior to hostilities, are vested in the crown; similarly, *British* property taken in course of trade forbidden by the laws of his country, is condemned to the Crown, and not to the individual captor.*

To prevent the custom house or excise vessels, that may be commissioned with letters of marque, turning their attention from the smugglers to the more attractive adventure of privateering, all interest in their prizes is reserved to the crown.†

Grants to the Admiralty.

Though all rights of prize belong originally to the Crown, yet it has been thought expedient to grant a portion of those rights to maintain the dignity of the Lord High Admiral. This grant, (whatever it conveys,) carries with it a total and perpetual alienation of the rights of the crown, and nothing short of an Act of Parliament can restore them; whereas the grant to private captors is nothing more than the mere temporary transfer of a beneficial interest. The rights of the Admiral, as distinguished from those of the Crown, are these; that when vessels come in, not under any motive arising out of the occasions of war, but from distress of weather, or want of provisions, or from ignorance of war, and are seized in port, they belong to the Lord High Admiral; but where the hand of violence has been exercised upon them, where the impression arises from acts connected

* 4 Rob. Adm. Rep. p. 262 (n).

† Prize Acts, 45 Geo. III. c. 75.

with war, from revolt of their own crews, or from being forced or driven in by the Queen's ships, they belong to the Crown.

This includes ships and goods already come into the ports, creeks, or roadsteads, of all the Queen's dominions.*

Acquisition of Captures.

Persons fitting out Private Vessels under a Commission to cruise against the enemy, acquire the property of whatever Captures they may make, as a compensation for their disbursements, and for the risks they run; but they acquire it by grant from the Sovran who issues out the commission to them. The Sovran allows them either the whole, or a part of the capture; this entirely depends on the nature of the contract he has made with them.†

This grant of prize is, in terms, a grant of the property of the Queen's enemies, but it is not restricted to the property of the nations with whom we are at war. It is held in construction and practice to embrace all property liable to be condemned as prize, and which is not particularly reserved to the Crown, or the Admiralty.‡

It depends, also, on the municipal regulations of each particular power: and as a necessary precaution against abuse, the owners of Privateers are required by the ordinances of commercial states to give adequate security that they will conduct the cruize according to the laws and usages of war, and the instructions of the Government; and that they will respect the rights of neutrals, and bring their prizes in for adjudication.

* Order of Council, 1665; the Maria Francaise, 6 Rob. Adm. Rep. 282; Rebekah, 1 Rob. 229.

† Vattel, book 3, chap. 15, sec. 229.

‡ The Elsebe, 5 Rob. 176.

Commissions of Privateers.

The Commissions of Privateers do not extend to the capture of private property upon land; that is a right which is not even granted to Queen's ships. The words of the 3rd Section of the Prize Act extend only to capture by any of Her Majesty's ships, "of any fortress upon the land, or any arms, ammunition, stores of war, goods, merchandize, and treasure, belonging to the state, or to any public trading company, of the enemies of the crown of Great Britain, upon the land." Thus the interests of the Queen's cruizers are expressly limited with respect to the property in which the captors can acquire any interest of their own, the state still reserving to itself all private property, in order that no temptation may be held out for unauthorized expeditions against the subjects of the enemy on land. With regard to private vessels of war, the Lords of the Admiralty are empowered by the 9th Section, to issue Letters of Marque, to the *Commanders* of any such ships or vessels, "for the attacking and taking any place or fortress upon the land, or any ship or vessel, arms, ammunition, stores of war, goods, or merchandize, belonging or possessed by any of Her Majesty's enemies in any sea, creek, river, or haven."

It was the purpose of the persons who brought in this bill, that Privateers should not be allowed to make depredations upon the coasts of the enemy for the purpose of plundering individuals, and for that reason they were restricted to fortified places and fortresses, and to property water-borne.*

As Privateers sometimes sail in company with Queen's vessels, and also in small squadrons, for the purpose of mutual assistance, the rights of the privateers vary. When a Privateer is sailing under the convoy of a Queen's ship, she takes no share in any prize taken by the ship, or even by

* The Thorshaven, Edw. Rep. 102; 45 Geo. III. c. 72.

herself, unless she has received orders from the convoying royal ship to give chase, or has acted hostilely against the enemy, actually aiding and assisting in the capture.*

When Privateers have sailed in company, it has often happened that not every vessel has been actually engaged in the capture of the prize, though they may have been rendering valuable assistance in a variety of forms, such as watching in the offing, guarding an open outlet of escape to the intended prize. In the disputes arising from these joint captures, Sir William Scott was the first to establish a settled intelligible system, on principles that might become in future easily applicable to the various cases that might arise.

Constructive Captors.

He says "the Act of Parliament (meaning the Prize Act), and the proclamation, give the benefit of prize to the takers, by which term, are naturally to be understood those who *actually take possession*, or those affording an actual contribution of endeavour to that event; either of these persons are naturally included under the name of takers, but the Courts of Law have gone further, and have extended the term 'takers' to those who, not having contributed actual service, are supposed to have rendered a constructive assistance, either by conveying encouragement to the captor, or intimidation to the enemy. * * * It has been contended that where ships are associated in a *common enterprize*, that circumstance is sufficient to entitle them to share equally and alike in the prizes that are made; but many cases might be stated when ships so associated would *not* share. I must ever hold that the principle of mere common enterprise is not sufficient—it is not sufficiently specific—it must be more limited. What is the real and true criterion? She being

* 45 Geo. III. c. 72, sec. 25.

in sight, or seeing the enemy's fleet accidentally, a day or two before, will not be sufficient; it must be at the commencement of the engagement, either in the act of chasing, or in preparations for chase, or afterwards during its continuance. If a ship was detached in sight of the enemy, and under preparation for chase, I should have no hesitation in saying that she ought to share; but if she was sent away after the enemy had been descried, but before any preparations for chase, or any hostile movements had taken place, I think it would be otherwise; there must be *some actual contribution of endeavour as well as a general intention.*"*

Efforts to suppress Privateering.

Powerful efforts have been made by humane and enlightened individuals to suppress Privateering, as inconsistent with the liberal spirit of the age. In the language of Chancellor Kent, "the object is not honour, or chivalric fame, but plunder and profit. The discipline of the crews is not apt to be of the highest order, and privateers are often guilty of enormous excesses, and become the scourge of neutral commerce."

They are sometimes manned and officered by foreigners, having no permanent connection with the country, or interest in the cause. This was a complaint made by the United States in 1819, in relation to irregularities and atrocites committed by private armed vessels, sailing under the flag of Buenos Ayres. Under the best regulations the business tends strongly to blunt the sense of private right, and to nourish a lawless and fierce spirit of rapacity.

Its abolition has generally been attempted by treaty. In the treaty of Prussia and the United States, in 1785, stipulations against private armed vessels were included. In 1675, a similar agreement was made between Sweden and Holland,

* The Vryheid, 2 Rob. 16.

but the agreement was not performed. France, soon after the breaking out of the war with Austria, in 1792, passed a decree for the total suppression of privateering, but that was a transitory act, and was soon swept away in the tempest of the Revolution.

Piratical Privateering.

On these considerations naturally follows that of the classes of Privateers that can be considered Pirates.

A Privateer differs from a Pirate, in that—first, the former is provided with a Commission, or with Letters of Marque from a Sovran, of which the Pirate is destitute. Secondly, the Privateer supposes a state of war (or at least that of reprisals); the Pirate plunders in the midst of peace, as well as in war. Thirdly, the Privateer is obliged to observe the rules and instructions that have been given him, and to attack by virtue of them only the enemy's ships, or those neutral vessels which carry on an illicit commerce; the Pirate plunders indiscriminately the ships of all nations, without observing even the laws of war. But in this last point Privateers may become Pirates when they transgress the limits prescribed to them; and this is one of the reasons why we often see the former confounded with the latter.*

Under these general definitions, we see that it is quite open to any citizen of the world to become a privateer under a foreign Sovran; and Martens goes on to say, that "there is nothing that prevents the granting of Letters of Marque, even to the subjects of neutral or allied powers who are able to solicit them; but since it is contrary to neutrality to suffer subjects to contribute by this means to the reinforcement of one of the belligerent powers, and to the annoyance of the other, states generally prohibit their

* Martens, on Privateering, p. 2.

subjects from taking Letters of Marque from a power, without the permission of their Sovereigns, and many treaties oblige them also to prohibit their subjects from doing it, as well as to forbid every species of armaments on the enemy's account, in their ports. However, the enemy is not justified in *punishing them as pirates*, when they have letters patent from one of the powers with whom it is at war, although their ship may be confiscated.*

The laws of the United States have made ample provision on this subject, and they may be considered as an expression of the general wish of civilized nations; and they prescribed specific punishment for acts which were before unlawful.

American citizens are prohibited from being concerned, beyond the limits of the United States, in fitting out or otherwise assisting any private vessel of war, to cruize against the subjects of friendly powers.†

In the various treaties between the powers of Europe, in the two last centuries, and in the several treaties between the United States and France, Holland, Sweden, Prussia, Great Britain, Spain, Colombia, Chili, &c., it is declared, that no subject or citizen of either nation shall accept a commission or letter of marque, to assist an enemy in hostilities against the other, under penalty of being treated as an enemy.‡

Title to Captured Property.

The Title to Property taken in War may, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor. As to personal property, the title is considered as lost to the

* But see the Introduction.

† Act of Congress, April 20, 1818, chap. 83.

‡ Kent, vol. 1, p. 100.

former proprietor, as soon as the enemy has acquired a firm possession, which, as a general rule, is considered as taking place after the lapse of twenty-four hours.*

Ships and goods captured *at sea*, are excepted from the operation of this rule. The right to all captures rests primarily in the Sovran, and no individual can have any interest in a prize, whether made by a crown or private armed vessel, but what he receives under the grant of the state.

When a prize is taken at sea, it must be brought with due care into some port, for adjudication by a competent court. The condemnation must be pronounced by a prize court of the Government of the captor, sitting either in the country of the captor, or of his ally. The prize court of an ally cannot condemn.†

Proceedings Preliminary to Condemnation.

The Proceedings Preliminary to Condemnation may be roughly described as follows:—

The *captor*, immediately on bringing his prize into port, sends up and delivers upon oath to the registry of the Court of Admiralty, all papers found on board the prize. The preparatory examinations of the captain and some of the crew of the *captured ship* are then taken, upon a set of standing interrogatories, before the commissioners of the port to which the prize is brought. These also are forwarded to the registry of the Court of Admiralty. A written *notice*, called a *monition*, is extracted by the captor from the registry, and served upon the Royal Exchange, notifying the capture, and calling upon all persons interested, to appear and show cause why the ship and goods should not be condemned. At the expiration of twenty days, the monition is returned into the

* Wheaton, vol. 2, p. 88-9.

† 1 Kent, sec. 5, p. 102; Rutherford's Institutes, book 2, chap. 9.

registry, with a certificate of its service; and if any claim has been given, the cause is then ready for hearing, upon evidence arising out of the ship's papers and preparatory examinations.

The *neutral master or proprietor of the cargo* takes measures as follows:—Upon being brought into port, the master usually makes a protest, which he forwards to London as instructions, (or with such further directions as he thinks proper) either to the correspondent of his owners, or to the consul of his nation, in order to claim the ship or such parts of the cargo as belong to his owners, or with which he was particularly entrusted; or the master himself goes to London to take the necessary steps, as soon as he has undergone his examination.

The master, correspondent, or consul, applies to a proctor, who prepares a claim supported by the affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong; and that no enemy has any right or interest therein; security must be given to the amount of sixty pounds, to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein. If the captor has neglected in the mean time to take the usual steps, (but which seldom happens, as he is strictly enjoined both by his instructions and by the Prize Act to proceed immediately to adjudication,) a process issues against him, on the application of the claimant's proctor, to bring in the ship's papers and preparatory examinations, and to proceed in the usual way.

As soon as the claim is given, copies of the ship's papers and examinations are procured from the registry, and upon the return of the monition the cause may be heard. It however seldom happens, owing to the great pressure of business, (especially at the commencement of war), that

causes can possibly be prepared for hearing immediately on the expiration of the time for the return of the monition; in that case, each cause must necessarily take its regular turn. Correspondent measures must be taken by the neutral master, if carried within the jurisdiction of a Vice-Admiralty Court, by giving a claim, supported by his affidavit, and offering a security for costs, if the claim should be pronounced grossly fraudulent.

If the claimant be dissatisfied with the sentence, his proctor enters an appeal in the registry of the Court, where the sentence was given, or before a notary public (which regularly should be entered within fourteen days after the sentence); and he afterwards applies at the registry of the Lords of Appeal in prize causes, which is held at the same place as the registry of the High Court of Admiralty, for an instrument called an inhibition, and which should be taken out within three months, if the sentence be in the High Court of Admiralty; and within nine months, if in a Vice-Admiralty Court; but may be taken out at later periods if a reasonable cause can be alleged for the delay which has intervened. This instrument directs the judge, whose sentence is appealed from, to proceed no further in the cause; it directs the registrar to transmit a copy of all proceedings of the inferior courts; and it directs the party who has obtained the sentence to appear before the superior tribunal to answer to the appeal. On applying for the inhibition, security is given on the part of the appellant to the amount of two hundred pounds, to answer costs, in case it should appear to the Court of Appeal that the appeal is vexatious. The inhibition is to be served upon the judge, the registrar, and the adverse party, and his proctor, by shewing the instrument under seal, and delivering a note of its contents. If the party cannot be found, and his

proctor will not accept the service, the instrument is to be served, *viis et modis;* that is, by affixing it to the door of the last place of residence, or by hanging it on the pillars of the Royal Exchange. That part of the process above described, which is to be executed abroad, may be performed by any person to whom it is committed, and the formal part at home is executed by the officer of the court. A certificate of the service is endorsed on the back of the instrument, sworn before the surrogate of the superior court, or before a notary public, if the service is abroad.

If the cause be adjudged in the Vice-Admiralty Court, it is usual, on entering the appeal there, to procure a copy of the proceedings, which the appellant sends over to his correspondent in England, who carries it to a proctor, and the same steps are taken to procure and send the inhibition as when the cause has been adjudged in the High Court of Admiralty. But if a copy of the proceedings cannot be procured in due time, an inhibition can be obtained, by sending over a copy of the instrument of appeal, or by writing to the correspondent an account only of the time and substance of the sentence.

Upon an appeal, fresh evidence may be introduced, if, upon hearing, the Lords of Appeal should be of an opinion that the cause is of such doubt, or that further proof ought to have been ordered by the court below.

Further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined with their clerks, and others acquainted with the real transactions, and with the real property of the goods claimed. In corroboration of these affidavits, may be annexed the original correspondence, duplicates of bills of lading, invoices, extracts from books, &c. These papers must be proved by affidavits of persons who can speak of

their authenticity; and if copies or extracts, they should be collected and certified by public notaries. The affidavits are sworn before magistrates, or others competent to administer oaths in the country where they are made, and authenticated by a certificate from the British Consul.

The degree of proof required depends upon the degree of suspicion or doubt that belongs to the case. In case of heavy suspicion and great importance, the court may order what is called "plea and proof," that is, instead of admitting affidavits and documents introduced by the claimant only, each party is at liberty to allege, in regular pleadings, such circumstance as may tend to acquit or condemn the capture, and to examine witnesses in support of the allegation, to whom the opposite party may administer interrogatories. The depositions of the witnesses are taken in writing. If the witnesses are to be examined abroad, a commission issues for that purpose; but in no case is it necessary for them to come to England. These solemn proceedings are seldom resorted to. Standing Commissions may be sent to any neutral country for the general purpose of receiving examinations of witnesses, in all cases where the court may find it necessary, for the purposes of justice, to decree an enquiry to be conducted in that manner.*

Prize Jurisdiction.

The Jurisdiction over Prizes is exercised by the Judge of the Admiralty, exclusively of every other judicature of the kind, except in cases of appeal.

This Jurisdiction in matter of Prize, (whether it is coeval with the Court of Admiralty, or, which is much more pro-

* This description of the preliminary proceedings in Prize is taken from the second volume of Wildman's Institutes of International Law, p. 355; cited by that author from a letter from Sir W. Scott and Dr. Nicholl to Mr. Jay, the American Minister.

bable, of a later institution, beyond the time of memory,) though exercised by the same person, is quite distinct in its nature.

The Judge of the Admiralty is appointed by a commission under the great seal, which enumerates particularly, as well as generally, every object of his jurisdiction, but not a word of prize.

To constitute that authority, in every war, a commission under the great seal issues to the Lord High Admiral to will and require the Court of Admiralty, and the Lieutenant and Judge of the said court, his surrogate or surrogates, and they are thereby authorised and required to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods that are or shall be taken, and to hear and determine according to the Courts of Admiralty and the Law of Nations.

A warrant issues to the judge accordingly.

The Court of Admiralty is called the Instance Court; the other the Prize Court. The manner of proceeding is totally different. The whole system of litigation and jurisprudence in the Prize Court is peculiar to itself.

Common Law Courts not always excluded

A thing being done on the high seas does not exclude the jurisdiction of the Courts of Common Law. For seizure, stopping, or taking a ship upon the high seas, but *not as prize*, an action will lie; but for taking *as prize*, no action will lie. The nature of the question, not the locality, excludes.

The end of a Prize Court is to suspend the property till condemnation, to punish every sort of misbehaviour in the captors; to restore instantly (full sail) if upon the most summary examination there does not appear a sufficient ground; to condemn finally, if the goods really are prize,

against everybody; giving every body a fair opportunity of being heard. A captor may, and must force everybody interested to defend; and every person interested may force him to proceed to condemn without delay.*

Prize Courts.

Before the sixth of the reign of Queen Anne there were no laws made on this subject. Previous to that time all prizes taken in war were of right vested in the Crown, and questions concerning the property of such prizes were not the subject of discussion in courts of law. But in order to do justice to claimants, from the first year after the Restoration of Charles the Second, special commissions were issued to enable the Courts of Admiralty to condemn such captures as appeared to be lawful prizes; to give relief where there was no colour for taking; and generally to make satisfaction to parties injured. By the Act of the 13 Car. II. c. 9, (now repealed) indeed, some regulations were made concerning the treatment of ships taken, but no provisions enacted respecting any security to be given on delivery; the sole interest in the thing condemned being in the Crown; it was in public custody, and the disposition of it a mere matter of prerogative; no such provisions therefore were necessary.

But in the sixth year of Queen Anne, it was thought proper, for the encouragement of seamen, to vest in them the prizes they should take; and for that purpose the statutes, 6 Anne, c. 13 and c. 37, were passed.

The first of these acts only relates to proceedings in the Courts of Admiralty in England, but contains no particular directions to them; the practice of those courts being already settled.†

There is a long series of statutes, which follows the above,

* Lindo *v.* Rodney, Doug. 614, note.

† Brymer *v.* Atkins, 1 H. Black.

on the subject of the Prize Courts. The following may be taken as a general description of their operation.

The judge should proceed, according to their form, to sentence with all possible expedition. If on the preparatory examination there arises a doubt in the breast of the judge, whether the capture is prize or not, and further proof appears to be necessary, the ship and cargo is appraised by persons named on the part of the captor, and is delivered up to the claimants, on their giving good and sufficient security to pay to the captor the full value, according to the appraisement, if the ship is adjudged lawful prize by the judge; by this the claimant is entitled to the immediate possession of the subject in dispute, which the captor cannot obtain but on the refusal of the claimant to give security for the appraised value. After a sentence of condemnation, the captor has a right to the possession; the execution of the sentence is not suspended by an appeal, but the party appellant gives good and sufficient security to restore the cargo, or its full value, in case the sentence is reversed.*

Where Prize Courts can be held.

Having explained shortly the operation of the Prize Courts, it must be observed, that the Prize Court of an Ally cannot condemn. Prize or no prize is a question belonging exclusively to the courts of the country of the captor. The reason is, that the Sovran has a right and is bound to inspect the conduct of the captors, for he is answerable to other states for the acts of the captor. The Prize Court of the captor may sit in the country of a co-belligerent or an ally, because there is a common interest between such on the subject, and both governments may be presumed to authorize any measures conducing to give effect

* Brymer *v.* Atkins, I. H. Black, p. 189.

to their arms, and to consider each others ports as mutually subservient.*

It is not lawful for such a court to act in a neutral territory; and it was at one time even doubted, where property had been carried into, and was lying in a neutral port, whether the validity of the capture could be determined even by a Court of Prize established in the captor's country; because it was thought that the possession in reach of the court was essential to the exercise of a jurisdiction in a proceeding *in rem*. The principle was admitted by Sir Wm. Scott to be correct, in the case of the Henrick and the Maria;† but he considered that the English Admiralty had gone too far in supporting condemnations in England, of prizes abroad in neutral ports, to permit him to recal the vicious practice of the Court to acknowledged principle.

Judgment of Prize Courts conclusive.

The jurisdiction of the Court of the capturing nation is conclusive upon the question of property in the captured thing. Its sentence settles all further dispute between claimants; and if that sentence is manifestly unjust, or against the Law of Nations, the state is alone responsible, and not the captors. An unjust sentence is a good ground for issuing commissions of Reprisals. Numerous treaties between the different powers of Europe, regulating the subject of Reprisals, declare that they shall not be granted, unless in case of the *denial of justice*. "An unjust sentence," says Wheaton, "must certainly be considered as a denial of justice, unless the mere privilege of being heard before condemnation is all that is included in the idea of justice."‡

Thus the sentence of a Prize Court, it is plain, is sufficient

* Floy Owen, 1 Rob. Adm. Rep. 136; Oddy *v.* Bovill, 2 East. 470.
† 4 Rob. Rep. 43.
‡ Wheaton, vol. 2, p. 97.

to confirm the captor's title to captures at sea;, but a different rule applies to real property or immoveables.

Immoveable possessions, lands, towns, provinces, &c., become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire subjugation and extinction of the state to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect. Thus, a third party cannot safely purchase conquered land till the Sovran from whom it has been taken has renounced it by a treaty of peace, or has irretrievably lost his sovereignty.* Until such confirmation, it continues liable to be divested by the *jus postliminii*. The purchaser of any portion takes it, at the peril of being evicted by the original Sovran owner, when he is restored to his dominions.†

I now pass on to the more commercial question of Passports, Safe-Conducts, and Licences to Trade.

* Vattel, book 3, chap. 13, sec. 197.
† Wheaton, vol. 2, p. 112.

SECTION III.

Licences.

Passports and Safe Conducts.

Passports, and Safe-conducts, are a kind of privilege, insuring safety to persons in passing and repassing, or to certain things during their conveyance from one place to another. All Safe-conducts, like every other act of Supreme Command, emanate from the Sovran authority, but are constantly delegated to inferior officers, either by an express commission, or by a natural consequence of the nature of their functions. The person named in the Passport cannot transfer his privilege to another. They generally promise security wherever the grantor has authority and command, and are interpreted by the same rules of liberality and good faith, with other acts of the Sovran power.*

Licences to Trade with the Enemy.

A Licence granted by a state to its own subjects, or to those of the enemy, is a dispensation on its own side of the Laws of War, as far as its terms can be fairly construed. The adverse party may justly consider such licence as a ground of capture and confiscation *per se;* but the Prize Courts of the state, under whose authority they are issued, are bound to consider them as lawful relaxations of the ordinary state of war. In the country which grants them, licences to carry on a pacific commerce are rigidly interpreted, as being exceptions to a general rule; though they

* Vattel, book 3, chap. 17, sec. 265—268.
† Page 6, ante.

are not to be construed with pedantic accuracy, nor will every small deviation be held to vitiate the fair effect of them.*

During the later period of the last century, and the earlier portion of this, licences were considered as privileges granted to individuals for their own benefit, and in which the nation at large was but little, or remotely, interested. They were therefore held liable to the same strict construction with other similar grants. Yet this rule was never held in a narrow captious manner; and if the apparent intention of Government was complied with, and there was no suspicion of fraud, a sufficient liberality was allowed in the construction. When the extraordinary mode of warfare established by the Emperor Napoleon, (by an attempt at a general embargo) was carried on, new expedients were required to counteract its evils, and licences to a great extent were granted to relieve the stagnant trade of the country; and this measure, so highly beneficial, and even necessary, was facilitated by the adoption of a still more liberal mode of construction, and which, no doubt, will again guide these cases.†

Duties of Merchants using Licences.

In trading under a Licence, the merchant ought to follow the terms of it as strictly as possible; but if he is acting *bonâ fides*, some breaches of it will be permitted. Being high acts of Sovranty, they are necessarily the creatures of that act of power, and must not be carried further than the intention of the great authority that grants them may be supposed to extend; not that they are to be construed with pedantic accuracy, nor that any small deviation should be held to vitiate the fair effect of them. An excess in the

* The Cosmopolite, 4 Rob. Rep. 8.

† The Abigail, Stewart's Adm. Rep. p. 360.

quantity of goods permitted might not be considered noxious to any extent. A variation in the quality or substance of the goods might be more significant, because a liberty assumed of trading in one species of goods, under a license to trade in another, might lead to very dangerous abuses. The license must be looked to for the enumeration of goods that are to be protected by it.*

The principles on which courts act in treating licences is thus succinctly laid down by Sir William Scott.—"I need not repeat what I have so often stated, the anxious wish of this court to relieve, as much as possible, the difficulties under which the commerce of the world now labours (November 1812,) and to apply the most favourable consideration to the construction of license cases. At the same time it is to be remembered, that the court possesses the mere power of interpretation; that it must confine itself to a reasonable explanation of the terms made use of, and cannot alter or dispense with conditions considered as essential by the Government granting the license. If the court assumes the power of extension by favourable interpretation, it does so only where there is a total absence of *bad faith*, and where unavoidable obstacles have been thrown in the way of an exact compliance with the terms prescribed. Where there has been a want of good faith, or a departure from the terms, beyond the necessity thus imposed, the court has not felt itself called upon to mitigate the penalties incurred by such a deviation.†

The Vessel. It is not an essential deviation from the licence, if ships of other countries than those designated in the license are

* Shroeder *v.* Vaux, 15 East. Rep. 52; 3 Camp. N. P. Rep. p. 83; the Cosmopolite, 4 Rob. 8.

† The Dauk Vaarhirt, 1 Dod. Adm. Rep. 187.

employed; provided those other countries have the same political bearing towards this kingdom as those mentioned in the licence. But it is not a matter of indifference to substitute a ship belonging to a country at war, for a neutral or native ship, at the will and pleasure of the holder of the licence.*

Where an enemy's ship was represented to be neutral, and under that disguise obtained a licence and was navigated, the ship and freight were condemned; and the cargo would have been involved in the same fate had it been shown that the owner of the cargo was privy to the fraud.†

A licence to trade in neutral bottoms does not extend to British ships.‡

The exportation of the produce and manufactures of this country is undoubtedly of great importance; but in time of war, it may be a matter of serious injury to the kingdom, if the commerce of the enemy is to be carried on in security under the abuse of British licences. The Courts of Admiralty and Prize, therefore, as far as lie in their power, guard against the fraudulent application of licences. The Cargo.

The following are a few practical rules for the guidance of merchants:—

1. Where the goods are enumerated in the licence, the best endeavour ought to be made to follow that enumeration. It is *not* a fatal departure from the licence to take on board non-enumerated articles, if done so by mistake, or inadvertence; but an essential and fraudulent departure from the conditions of the licence is a total defeasance of it.§

2. When a licence is granted to *one* person, it cannot be

* The Dauk Vaarhirt, Dod. Adm. Rep. 187.
† Idem.
‡ The Jonge Arend, 5 Rob. 14.
§ The Henrietta, 1 Dod. Adm. Rep. 173.

be made to extend to the protection of all other persons who may be permitted by that person to take advantage of it.*

3. Where A and B have obtained a licence to import, *as for themselves, or their agents, or the bearers of their bill of lading*, the only persons entitled to act under that licence, are A and B, as *importers*, or their agents, or persons holding their bills of lading, and claiming under bills of lading, which A and B, *after having conducted the importation from the enemy on their own account*, have transferred to them.†

4. Under a licence to *import*, the British merchant must not also be the *exporter*. He is not permitted under such a licence to go to the enemy's country, and there act as an enemy's merchant, carrying on the export trade of that country.‡

5. Sometimes, in describing the property in licences, the privilege is extended to all property of a certain class, "to whomsoever the property may appear to belong." In such cases no enquiry is ever made as to the proprietary interest in the property; but if the words are not introduced into the licence, it does not protect enemy's property.§

The Voyage. In the Voyage, also, the merchant must follow the licence. It is vitiated by changing the place of shipment. Thus, where a licence was to bring away a cargo from Bordeaux, and the party thought proper to change the licence, and accommodate it to another port in France, it was held by the English Admiralty that the licence was vitiated, and the vessel and cargo were condemned.‖

* The Jonge Johannes, 4 Rob. Adm. Rep. 268.
† Idem.
‡ The Jonge Klassina, 5 Rob. Adm. Rep. 297.
§ The Cousinne Marianne, Edw. 346.
‖ The Twee Gebroeders, Edw. Adm. Rep. 95.

Enemies trading to the ports of this country must strictly comply with the conditions under which that permission is granted. No voluntary deviation from the *course* pointed out can on any account be tolerated; except under the pressure of irresistible necessity. The character of enemy revives, when such a trader so deviates from his appointed course, even if there is no *malâ fides*, and he runs all the perils of an enemy on an English coast.*

It is a violation of a licence to touch at an intermediate port under a licence for a direct voyage to this country, the presumption being that at the intermediate port the vessel might receive another destination, or might actually deliver her cargo in that port.†

Time. Of course when the period for which a licence has been granted has expired, it no longer has any operation; yet in cases in which parties have used due diligence, but have been prevented by accident from carrying their intentions into effect within the time, it has been holden that, though their licences have expired, they are entitled to protection.‡

A licence cannot be *ante dated*, and if granted subsequent to capture it is no protection against condemnation. It is in its very nature prospective, pointing to something which has not yet been done, and cannot be done at all without such permission. Where the act has already been done, and requires to be upheld, it must be by an express confirmation of the act itself, as by an indemnity granted to the party; but a licence necessarily looks to that which remains to be done, and can extend its influence only to future operations.§

* The Manly, 1 Dod. 257.
† Europa, Edw. 42.
‡ Golden Hoop, Nov. 7, 1809, 1 Edw. Rep.
§ The St. Ivan, Edw. 376.

NOTE.—It has been before pointed out, that the Queen has, by her prerogative, the power of granting licences. But the Navigation Laws could not, of course, be dispensed with by the royal prerogative. Various acts, therefore, were passed to alter or qualify them, according to the new condition of things which was produced in time of war. These acts expired with the several wars that suggested them; but the almost total repeal of the celebrated Navigation Laws will render the re-enactment of similar war measures almost unnecessary.

SECTION IV.

Ransom, Recaptures, and Salvage.

Ransom.

Sometimes circumstances will not permit property captured at sea to be sent into port; and the captor, in such cases, may either destroy it, or permit the original owner to redeem it.

It was formerly the general custom to redeem property from the hands of the enemy by Ransom, and the contract is undoubtedly valid, when municipal regulations do not intervene. It is now but little known in the commercial law of England, for several statutes in the reign of George the Third absolutely prohibited British subjects the privilege of ransom of property captured at sea, unless in a case of extreme necessity—to be judged of by the Court of Admiralty.*

These contracts are generally drawn up at sea, and by virtue of them, the captain of the captor engages for the release and safe conduct of the taken ship, in consideration of a sum of money, which the master of the captured vessel, on behalf of himself and the owners of his ship and cargo, engages to pay, and for the payment of which he delivers a hostage as security. The contract is drawn up in two parts, of which the captor has one, which is called the ransom bill; the master of the captured vessel has the other, which operates as his safe conduct.

* 1 Kent, 103. The statutes are, 22 Geo. 3, c. 25; 35 Geo. 3, c. 66, sections 35, 36; 45 Geo. 3, c. 72, sections 16, 17, 18, and 19.

By the French law this safe conduct only protects the vessel to its own port, or its port of destination, if nearer that. In other countries the pass allows the ship to continue its voyage; but operates only to protect the vessel in the course prescribed, and within the time limited by the contract. It protects only against capture, unless by agreement it provides also against *total loss* by perils of the seas.

During war, and while the character of alien enemy continues, no suit will lie in the British Courts by the enemy, in proper person, on a ransom bill, notwithstanding it is a contract arising out of the law of war. The remedy to enforce payment of the ransom bill for the benefit of the enemy captor, is by an action by the imprisoned hostage, in the courts of his own country, for the recovery of his freedom.

The hostage consists generally of one or two principal officers of the captured prize, more generally one only.

As the ransom is in the nature of a pledge, the ransom cannot exceed the value of the ship, so that the master cannot bind his owner for a larger value; and on the same principle, the captor is bound to take the vessel or its value if abandoned by the owner, or what it sells for if the owner is insolvent. He is also bound to maintain the hostage, and that is an item in the ransom bill. In estimating the ransom and expenses of the hostage as a damage or loss, they are regarded in the nature of general average, and the several persons interested in the ship, freight, and cargo, must all contribute towards them.*

* There are a few other general points with respect to ransoms, which will be found *infra* under recaptures. Valin is the principal authority, and his law will be found well summed up in the 2nd volume of Wildman's Institutes of International Law. There are few cases on the subject; the chief are, Ricard *v.* Bellenham, 3 Burr, 1734; Yates *v.* Hall, 3 T. R. 76, 80; Authon *v.* Fisher, Corner *v.* Blackburn, 2 Doug.

Recaptures.

Although in strictness *every* prize legally made, may be adjudged to the captor, yet there are cases where he ought to restore, wholly, or in part, that which he may legally have taken from the enemy. This is the case of recaptures.

According to the universal law of nations, the question whether the recapture ought to be restored to the first proprietor, seems to depend essentially on another, namely, whether the captor has become full proprietor of the prize, *to the total extinction* of the rights of the first proprietor. If we admit that he may have become so, there would be no further perfect and external obligation on the *recaptor* to restore property which has become that of the enemy; and on which the first proprietor has lost all claim. There may be a thousand reasons of equity why he should not enrich himself by the spoil of his fellow citizens or friends; but then, that restitution would not be according to the strict rule of natural law; if indeed all claim had so passed away.

The captor has, without doubt, a right to take away the enemy's goods. He may, without troubling himself with the proprietor's rights, detain them, with intent to appropriate to himself, in the same manner, in every respect, as he may sieze *res nullius* in the time of peace; but it does not follow from thence that the effect of these two actions is the same, when applied to objects of so different a condition, or that the right of war alone, without cession or renunciation, is a title sufficient for a full property.

By the Laws of War the right and power of *possession* is in the captor; the *right of property* remains in the proprietor. This right of war, which is personal in the captor, not being capable of cession, cannot bind a third person, who acquires the prize by recapture during war; and nothing prohibits the original proprietor from prosecuting his rights against him; accordingly, without making any destinction

between conquest, booty, or prize; the goods taken by the enemy, however legal that capture might be, however certain the possession of them might be, do not become his full property till the moment of peace; and that during the whole course of the war it may be claimed by the first proprietor from the hands of every third possessor. From this it follows that every recapture, made at any period of the war whatever, whether the capture may have been legal, or whether it may have been illegal; whether the recapture be made by a Sovran, or by a privateer; ought to be restored to the original owner on a just repayment of the costs and damages of every recaptor, unless the illegality of the recapture precludes the recaptor from the privilege of demanding the indemnification.*

Salvage. The costs and damages paid to the recaptor are termed Salvage. It was the ancient law of this country, that a possession of twenty-four hours was a sufficient conversion of the property, and unless it was reclaimed before *sundown*, the owner was divested of his property. Thus there was a complete obliteration of the rights of former owners. This was the ancient law of England, and was in accordance with the ancient law of Europe.

This rule has been receded from in this country, since the increase of her commerce. During the time of the usurpation, when England was becoming commercial, an alteration was effected by the ordinance of 1649, which directed a restitution, upon salvage, to British subjects; and the same indulgent rule was continued afterwards, when this country became still more commercial.

This country, as a commercial country, has thus departed from the old law, and has made a new and peculiar law for itself, in favour of merchant property recaptured, introducing

* Martens on Privateers and Recaptures.

a policy not then introduced by other countries, and differing from its own ancient practice.

Recaptures converted into Ships of War are not restored.

There is one exception to this law. The Prize Act provides that if a recaptured ship, originally taken by her Majesty's enemies, shall appear to have been by them "*set forth as a ship or vessel of war*," the said ship or vessel shall not be restored to the former owners or proprietors; but shall, in all cases, whether retaken by any of Her Majesty's ships, or by any privateer, be adjudged lawful prize for the benefit of the captors. When the former character of the vessel has been once obliterated by her conversion into a ship of war, the title of the former owner, and his claim to restitution, are extinguished, and cannot be revived by any subsequent variation of the character of the vessel.

Setting forth does not necessarily mean sending out of port with a regular commission. It is sufficient if she has been used as part of the *national* force of the enemy, by those in *competent* authority.*

Capture a material question in cases of Recapture.

As it has been stated above, in cases of recapture, the material question is, whether there was such a capture made by the enemy, as to found a case of re-capture.

This is settled by the question whether the enemy have an effectual possession; by this is not meant the *complete* and firm possession obtained by condemnation in a Court of Prize, but that effectual possession, that if not interrupted by recapture, would have enabled the captor to exercise rights of war over her. For this purpose it is not necessary that the possession should be *long* maintained. The following are some examples of such effectual possession.

* The Ceylon, 1 Dod. 105; l'Actif, Edw. 185, *vide etiam;* the Nostra Signora, 3 Rob. 10; the Georgiana, 1 Dod. 397; the Horatio, 6 Rob. 320.

An English merchantman, separated from her convoy during a storm, was brought to by an enemy's lugger, which came up and told the master to stay by her till the storm was abated, when they would send a man on board; a British frigate coming up afterwards chased the lugger and took her, thus releasing the merchantman; the frigate was held entitled to salvage.*

But when a small English vessel, armed with two swivels, forced a privateer row-boat from Dunkirk to strike, but was not able to board her, because the English vessel has only three men, and no arms but the swivels,—the Frenchman being filled with a well armed crew; and subsequently, the row-boat was forced to put into the port of Ostend, then the port of an ally; this might not be a capture under the act, so much as it was under the general maritime law.

A vessel brought out of port, and which was in the power, though not in the actual occupation of the enemy, was thus rescued from considerable peril, was held to be recaptured.†

Similarly, with a vessel abandoned by the enemy, having possession of her, through the terror of an approaching force.‡

There is no claim to Salvage where the property rescued was not in the possession of the enemy, or so nearly as to be certainly and inevitably under his grasp.

Recapture of Property of Allies.

England restores the Recaptured Property of her Allies, on the payment of salvage; but if instances can be given of British property retaken by them, and condemned as prize, the Court of Admiralty will determine their cases according to their own rule.§

* The Edward and Mary, 3 Rob. 305.
† The Pensamento Felix, Edw. 115.
‡ The Charlotte Caroline, 1 Dod. 194.
§ Santa Cruz, 1 Rob. 63.

Recapture of Neutral Property.

It is not the practice of modern nations to grant Salvage on the Recapture of Neutral Vessels; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is no essential service to him; for the enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him with costs and damages, for the injurious seizure and detention. This proceeds on the supposition, that those tribunals would duly respect the law of nations; a presumption which, in the wars of civilized states, each belligerent is bound to entertain in their respective dealings with neutrals. But in the wild hostilities declared and practised by France in the Revolutionary War, there was a constant struggle between the governing powers of France and the maritime courts, which should most outrage the rights of neutral property; the liberation of neutral property out of their hands then came to be deemed, not only by Lord Stowell, but by the neutrals themselves, a substantial benefit; and salvage for such service was not only awarded, but thankfully paid.*

Jus Postliminii.

The rule by which things taken by the enemy are restored to their former owner, upon coming again under the power of the nation to which they formerly belonged, is termed *jus postliminii*, or the right of postliminy. Real property, which is easily identified, is more completely within the right of postliminy than moveable property, which is more transitory in its nature, and less easily recognized. During war, the right of postliminy can only be claimed in the tribunals of the belligerent powers, and not in the courts of neutrals; for by a general law of nations, neutrals have

* The War Onskan, 2 Rob. 300.

no right to enquire into any captures, except such as are an infringement of their own neutrality.*

Costs and Damages to Owners for invalid Seizures.

It often happens that captains of ships of war and privateers make seizures of native or neutral vessels, under the impression that such vessels are occupied in illicit trade or other condemnatory acts. This may arise from error, and in such cases the vessel is restored to the owner by the prize court; but still there may be circumstances justifying the seizure, though not condemnation; and if condemnation is not granted, the owner sets up a claim for any damage that may have occurred to his vessel.

And the rule is, that where the capture is not justifiable, a captor is answerable for every damage.†

But if a seizure is justifiable, all that the law requires is that the captor shall be held responsible for *due diligence;* it is not enough that the captor should use as much caution as he would in his own affairs, the law requires that there should be no *deficiency of due diligence.*‡

When property is confided by an owner to another person, the care that the owner would take of his own property may be a reasonable criterion of the care that he may expect his agent to take. But in the case of capture, there is no confidence reposed, nor any voluntary election of the person in whose care the property is left. It is a compulsory act of justifiable force, but still of such force as removes from the owner any responsibility for the imprudent conduct of the prize-master. Hence, where the prize-master refused to take a pilot, and the ship and cargo were lost, restitution in value was decreed.

* 1 Kent, Com. 108.
† The William, 6 Rob. 316.
‡ Idem.

CHAPTER III.

SECTION I.

Neutrality.

Rights of Neutral Nations.

It now only remains for me to place before the reader the Rights and Obligations of Neutral Nations, as they influence Commerce.

Neutral Nations are those who, in time of war, take no part in the contest, but remain common friends to both parties, without favouring the arms of the one to the prejudice of the other.*

Neutrality consists in—1st, Giving no assistance when there is no obligation to give it; nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war. 2ndly, In whatever does not relate to war, a neutral and impartial nation must not refuse to one of the parties (on account of his present quarrel) what she grants to the other.†

Qualified Neutrality.

These rules do not apply to engagements by treaty, to which the Neutral may be bound previous to war; as for example, an engagement to furnish one of the belligerent parties with a *limited* succour in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally with his prizes.‡

Neutrality, again, may be qualified by treaties (antecedent to war), to admit vessels of war, with their prizes, of

* Vattel, book iii. c. 7.

† Idem.

‡ 2 Wheaton, chap. iii. sec. i. p. 133.

one of the belligerent parties, into the neutral's ports, to the complete or limited exclusion of the other.

Neutral Territory protected.

The Rights of War can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. To make use of neutral territory for the *proximate* purposes of war cannot be allowed, although it is to be understood that the prohibition does not extend to remote objects and uses, such as procuring provisions, and other innocent articles.*

The sanctity of a claim of territory is very high. When the fact is established, it overrules every other consideration; the property taken must be restored, notwithstanding that it belongs to the enemy; and if the captors should have erred wilfully, and not merely through ignorance, he would be subject to further punishment. It is however, a point on which foreign states are very likely to be misinformed and abused, by the interested representations of those who are anxious to catch at their protection. The claim of territory is, therefore, to be taken according to the letter of the law, and to be made out by clear and unimpeached evidence. The right of seizing the property of the enemy is a right which extends, generally speaking, *universally*, wherever that property is found. The protection of neutral territory is an exception only to the rule; it is not therefore to be considered disrespectful to any government that the fact, on which such claims are founded, should be accurately examined†.

The neutral territory is supposed to extend three English miles from the shore.‡

* Wheaton, vol. ii. 137; Kent's Com. vol. i. p. 116.

† Vrow Anna Catharina, 5 Rob. 18.

‡ Idem.

Property of Belligerents in Neutral Territory.

But the general inviolability of neutral character goes further than merely the protection of neutral property. It protects the property of belligerents within the neutral territory. Thus, if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury, and effect restitution. As for example, in 1793, the English ship Grange was captured in Delaware Bay, by a French frigate, and upon due complaint, the American Government caused the British ship to be promptly restored. Similarly, in the case of the Anna, restoration was made of property captured by a British cruizer near the mouth of the Mississippi, and within the jurisdiction of the United States.*

An armed ship has no right to lie in a neutral harbour, in order to make it an habitual *station* for her captures, as that would be a continuous direct infringemeut on neutral trade with the enemy; but if she is accidentally in a neutral port, and sees an enemy coming, she may go out and fight or take her, beyond the range of neutral ground.† Nor ought captors to station themselves at the mouth of a neutral river for exercising the rights of war from that river, much less in the very river itself.‡

The doctrine is carried to the extent that no use of a neutral territory for the purposes of war is to be permitted; this does not include *remote* uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that no *proximate* acts of war, in any manner, are to be allowed to originate on neutral grounds;—thus a ship has no right to station herself in neutral waters, and then to send out her boats on

* 1 Kent's Com. p. 117; The Anna, 5 Rob. Adm. Rep. 373.

† Vrow Anna Catharina, 5 Rob. 18.

‡ The Anna, 5 Rob. 385 c.

hostile enterprises beyond the boundary. This is a *direct hostile use* of the neutral territory, and many instances have occurred in which such an irregular use of neutral territory has been warmly resented. Nor can the neutral, in true consistency with his neutrality, permit such a course of war.*

Vessels chased into a Neutral Port.

Bynkershoek has maintained the anomalous principle, that vessels may be chased into a Neutral Territory, and there captured; but there is in reality no exception to the rule, that every voluntary entrance into a neutral territory, with hostile purposes, is absolutely unlawful.

But this restoration takes place only on the application of the neutral government whose territory has been thus violated, the neutrality alone being the ground of the invalidity of the capture.†

Consent of Neutral State necessary.

Though a belligerent vessel may not enter within neutral jurisdiction for hostile purposes, she may, consistently with a state of neutrality (unless prohibited by the neutral power), bring her prize into the neutral port and sell it there.

Freedom of Neutral Commerce.

A neutral has a right to pursue his accustomed commerce, and he may become the carrier of the enemy's goods, without being subject to confiscation of the ship, or of the neutral articles on board; though not without the risk of having the voyage interrupted by the seizure of the hostile property. If we find an enemy's effects on board a neutral ship, we seize them by right of war; but we are naturally bound to pay the freight to the master of the vessel, who is not to suffer by such seizure.‡

* The Twee Gebroeders, 3 Rob. A. R. 162.

† The Etrusco, 3 Rob. Adm. Rep.

‡ 1 Kent Com. p. 116; Vattel, book iii, chap. vii, sec. 115. See also, The Immanuel, 2 Rob. Adm. Rep. 198, and the Notes on the Declarations, in Appendix.

The effects of neutrals found in an enemy's ship, are to be restored to the owners, against whom there is no right of confiscation,—but without allowance for detainder, decay, &c. Neutrals voluntarily expose themselves to these accidents by embarking their goods in a hostile ship.*

We have before mentioned that neutral ships do not afford protection to an enemy's property. It may be seized if found on board of a neutral vessel, *beyond the limits of the neutral jurisdiction.* This is a clear and well-settled principle of the Law of Nations.

When an enemy's ship, containing free goods, is taken, if the captor carries the goods to the port of destination, he is entitled to the freight. He stands in the place of the *owner of the ship,* and performs (by completing) the specific contract between the owner and charterer. But he *is not* entitled, if he does *not* proceed and perform the original voyage.† The specific contract is performed in the one case, and not in the other. But freight will be allowed to the captor, even though he does not carry the goods to the port of destination, if he carries them to his own country, and to the ports to which they would have been consigned, if not prevented by the regulations of the country of embarkation.‡

Under certain circumstances the *Captor* is considered entitled to Freight, even though the goods are carried to his own country, and restored.

If the captor does anything to injure the property, or is guilty of misconduct, he may remain answerable for the effect of such misconduct or injury, in the way of set-off against him.§

* Vattel, book iii, chap. vii, sec. 116.
† The Fortuna, 4 Rob. Rep. p. 278.
‡ The Diana, 5 Rob. Rep. 57.
§ The Fortuna.

No right of *visitation* and search, of capture, nor any other kind of belligerent right, can be exercised on board a *public neutral* vessel on the high seas. But *private* vessels form no part of neutral territory, and when within the limits of another state, are not exempt from local jurisdiction.*

The right to take enemy's property on board a neutral ship has been much contested by particular nations, whose interests it strongly opposed. This rule has been steadily maintained in Great Britain, though in France and other countries it has been fluctuating. For the first time, England has voluntarily abandoned this right in the present war.

If a neutral vessel, having enemy's goods on board, is taken, and there is nothing unfair in the conduct of the neutral master, he will even be entitled to his reasonable demurrage. The captor pays the whole freight, because he represents the enemy, by possessing himself of the enemy's goods by right of war; and although the whole freight has not been earned by the completion of the voyage, yet as the captor, by his act of seizure, has prevented its completion, his seizure operates to the same effect as an actual delivery of the goods to the consignee, and subjects him to the payment of the full freight.† In such case, however, the neutral master must have acted *bonâ fide*, and with strictly neutral conduct.

This Rule Changed by Convention.

This Rule is often Changed by Convention; and it is generally stipulated that "*free ships shall make free goods.*" The converse, though also sometimes the subject of treaty, does not of necessity hold, *enemy's ships do not make enemy's goods.* Goods of neutrals, found on enemy's ships, are bound to be restored.‡

* *Vide* Vattel.

† Kent's Com. 123; The Copenhagen, 1 Rob. Adm. Rep. 290.

‡ *Vide post.* Section IV, and Notes on the Declarations. Appendix.

A neutral subject is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject nevertheless to the rights of the enemy who may capture the vessel; who has no right, according to modern practice, to condemn the neutral property. Neither will the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could not have foreseen.*

Neutral Goods on *Armed* Hostile Vessels.

In America, Neutral Goods laden on an *Armed*† Belligerent Vessel are still protected, but in England it is different. "If the neutral," says Sir Wm. Scott, "puts his goods on board a ship of force, which will be defended by force, he betrays an intention to resist visitation and search, and so far adheres to the belligerent, and withdraws himself from his protection of neutrality."‡

The Sale and Purchase of Vessels by Neutrals.

The Purchase of Ships from the enemy, is a liberty that has not been denied to neutral merchants, though by the regulation of France, it is entirely forbidden. The rule that this country has been content to apply is, that property so transferred, must be *bonâ fide* and absolutely transferred; there must be a sale divesting the enemy of all further interest in it; and that any thing tending to continue his interest, vitiates a contract of this description altogether.§

Russia is reported to have several vessels of war in different parts of the world; some of these vessels have been sold, and others are said to be in the process of sale. I shall cite what Sir Wm. Scott says, on a case nearly similar. "There have been many cases of enemy *merchant vessels* driven into ports out of which they could not escape, and

* The Fancy, 1 Dod. Adm. Rep. 448.
† The Nereide, 9 Cranch Rep. 398.
‡ The Fancy, 1 Dodson's Adm. Rep. 448.
§ The Sechs Gesawhistern, 4 Rob. Adm. Rep. 100.

there sold, in which after much discussion, and some hesitation of opinion, the validity of the purchase has been sustained. But whether the purchase of a vessel, *built for war*, and employed as such, and rendered incapable of acting as a ship of war, by the arms of the other belligerent, and driven into a neutral port for shelter; whether the purchase of such a ship can be allowed, which shall enable the enemy so far to rescue himself from the disadvantage into which he has fallen, as to have the value restored to him by a neutral purchaser, is a question on which I shall wait for the authority of a superior court, before I admit the validity of such a transfer."*

It has been said that the sale must be absolute and unconditional; so that a sale under a condition to re-convey at the end of the war, is invalid.† Similarly, where the seller is bound by his own government under a penalty not to sell, except upon a condition of restitution at the end of the war, and the purchaser undertook to exonerate the seller, the sale was held invalid.‡

Section II.

Contraband of War.

Contraband of War.

The general freedom of neutral commerce is subject to certain restrictions with respect to neutral commerce. Among these is the trade with the enemy in certain articles, called *Contraband of War*. These are generally warlike stores, and articles which are directly auxiliary to warlike purposes. Writers on this subject have made distinctions between

* The Minerva, 6 Rob. Adm. Rep. 399.
† The Noydt Gedart. 2 Rob. 137, (n.)
‡ 4 Rob. 100.

those things useful only for the purposes of war, those which are not so, and those which are susceptible of indiscriminate use in war and peace.

All seem to agree in excluding the first class from neutral trade; and, in general, admitting the second. The chief difference is about the third class. The last kind of articles—for example, money, provisions, ships, and naval stores, according to Grotius, are sometimes lawful articles of neutral trade, and sometimes not; and the question depends upon circumstances. This is perhaps the truest ground of decision, as we shall see in subsequent illustrations.*

Thus, these articles become contraband, *ipso facto*, if carried to a besieged town, camp, or port. So in a *naval* war, ships and materials for ships, are contraband, although timber and cordage may be used for other purposes, besides fitting out ships of war; and so horses and saddles are not of necessity warlike stores, except when comparing the quality, manufacture, or quantity attempted to be imported into the hostile state, with the circumstances and condition of the war, it appears (if not to be impossible) to be in the highest degree unlikely, that they should be designed for any other purposes besides the purposes of war.†

Provisions, when Contraband.

Common Provisions are not Contraband in general prize law, except in the single case of being sent to a beseiged or blockaded place.‡

It is a modern practice, in order to remove all possible doubt as to what goods are contraband, for nations at war to enumerate them particularly in treaties or compacts with

* See in the Appendix a table of articles of commerce that have been declared contraband.

† Grotius, book iii. chap. i. sec. v.; Rutherfurd's Instit. book ii. chap. ix. sec. xix.

‡ The Commercen, 1 Wheaton's Rep. 241.

neutral states; and such treaties leave the neutral, with which they are made, at liberty to supply the enemy with all goods that are not enumerated in them. These treaties do not operate as a law; but like other treaties, are binding only between the nations that are parties to them.*

Lord Stowell's Opinion on Contraband of War.

The Opinions of our great English authority, Lord Stowell, on this subject, are contained in two judgments, of which the following is the substance:—

"In 1673, many unwarrantable rules were laid down by public authority respecting Contraband. It was expressly asserted by a person of great knowledge and experience in the English Admiralty, that by its practice *corn, wine, and oil,* were liable to be deemed contraband. In much later times, many sorts of provisions, such as butter, salted fish, and rice, have been condemmed as Contraband. The modern established rule was, that generally they are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it; among the causes which tend to prevent provisions from being treated as contraband, one is that they are of the growth of the country which exports them.

"Another circumstance, to which some indulgence, by the practice of nations, is shown, is where the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it, are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered so noxious a commodity as any of the final preparations of it for human use. But the most important destinction is, whether the articles are destined for the ordinary uses of life, or for military uses. The nature and quality of the

* The Commercen, 1 Wheaton's Rep. 241.

port to which the articles are going, is a test of the matter of fact on which the distinction is to be applied. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ship of war may be constructed in that port. On the contrary, if the great predominant character of a port is that of a port of naval equipment, it shall be contended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final application of an article, *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going, a considerable armanent was notoriously preparing, to which a supply of those articles would be eminently useful." *

In a later case he seems to have modified his opinion with respect to undoubted naval stores, either so by nature, or intended as such for the occasion. He says—"The character of the port is immaterial, since naval stores, if they are to be considered as contraband, are so without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of military equipment. The consequences of the supply may be nearly the same in either case. If sent to a mercantile port, they may be applied to immediate use in the equipment of privateers, or they may be conveyed from the mercantile to the naval port, and there become subservient to every purpose to which they could have been applied if going directly to a port of naval equipment." †

* The Jonge Margaretha, Rob. Adm. Rep. vol. i. p. 192.

† The Charlotte, Rob. Adm. Rep. vol. v. p. 305.

Controversy between England and America on Contraband Provisions.

The doctrine of the English Admiralty Court, as to provisions becoming contraband, was adopted by the Government in the instructions given to their cruisers, on the 8th June, 1793, directing them to stop all vessels laden wholly, or in part, with corn, flour, or meal, bound for France, and to send them into a British port to be purchased by Government; or to be released on condition that the master should give security to dispose of his cargo in the ports of some country in amity with his Britannic Majesty. This was resisted by the Neutral Powers, Sweden, Denmark, and especially the United States.

This order was justified upon the ground, that by the modern law of nations, all provisions are to be considered as contraband, and as such liable to confiscation, wherever depriving an enemy of these supplies is one of the means intended to be employed for reducing him to terms. The actual situation of France, (it was said,) was notoriously such, as to lead to the employing this mode of distressing her by the joint operations of the various powers engaged in the war; and the reasonings of the text writers applying to all cases of this sort were more applicable to the present case, in which the distress resulted from the unusual mode of war adopted by the enemy himself, in having armed almost the whole laboring class of the French nation, for the purpose of commencing and supporting hostilities against almost all European Governments; but this reasoning was most of all applicable to a trade, which was in a great measure carried on by the then actual rulers of France, and was no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war, and were then carrying it on against Great Britain.

This reasoning was resisted by the neutral powers—

Sweden, Denmark, and especially the United States. The American Government insisted, that when two nations go to war, other nations who choose to remain at peace, retain their natural right to pursue their agriculture, manufactures, and ordinary vocations; to carry the produce of their industry for exchange to all countries, belligerent or neutral, (as usual;) to go and come freely without injury or molestation; in short, that the war, (amongst other) should be for neutral purposes, as if it did not exist; the only exceptions being trade in implements of war, or to a place blockaded by its enemy. That there were sufficient treaties to decide what were implements of war. Corn, flour, and meal, were not of the class of contraband.

The result of this controversy was a treaty with the United States in 1794. It confined contraband to military and naval stores; and with respect to provisions not generally contraband, it was agreed, "That whenever such articles became contraband by the Law of Nations, and should for that reason be seized, the same should not be confiscated, but the owners thereof should be speedily and completely indemnified; and the captors, or in their default, the Government under whose authority they act, should pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention."

The instructions of June, 1793, had been revoked previously to the signature of this treaty; but before its ratification, the British Government issued, in April, 1795, an order in council, instructing its cruizers to stop and detain all vessels laden wholly, or in part, with corn, flour, meal, and other provisions, and bound to any port in France, and to send them to such ports as might be most convenient, in

order that such corn, &c., might be purchased on behalf of Government.

This last order was subsequently revoked, and the question of its legality became the subject of discussion in a mixed commission, constituted under the treaty, to decide upon the claims of American citizens, by reason of irregular or illegal seizures of their vessels and cargoes, under the authority of the British Government.

A full indemnification was allowed by the commissioners, under the 7th article of the Treaty of 1794, to the owners of vessels and cargoes seized under the orders in council, as well for the loss of a market as for the other consequences of their detention.

It was, however, urged on the part of the United States, that the 18th article of the Treaty of 1794, manifestly intended to leave the question where it was before, namely, that when *the law of nations*, existing at the time the case arises, pronounces the articles contraband, they may for that reason be seized; when otherwise, not so. Each party was thus left free to decide what was contraband in its own courts of the law of nations, leaving any false appeal to that law to the usual remedy of reprisals and war.*

Since the ratification of this treaty, we have a decision of Lord Stowell, in 1799, on this very subject, in the case of the Haabet, which, however, arose on a question of insurance.

"The right of taking possession of provisions is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely. A century has now elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times, of holding such cargoes subject

* 2 Wheaton, 194, 210.

only to a right of pre-emption; that is, to a right of purchase, upon a reasonable compensation, to the individual whose property is thus diverted. This claim on the part of the belligerent cannot go beyond cargoes avowedly bound to the enemy's ports, or suspected on just grounds to have a concealed destination of that kind. The neutral can only expect a reasonable compensation. He cannot look to the price he would obtain in the enemy's port. An enemy, distressed by famine, may be driven by his neccessities to pay a famine price; but it does not follow that the belligerent, in the exercise of his rights of war, is to pay the price of distress."*

"It is a mitigated exercise of war, on which any purchase is made; and no rule has established that such a purchase shall be regulated exactly on the same terms of profit which would have followed the adventure, if no such exercise of war had intervened; it is a *reasonable* indemnification, and a *fair profit*, that is due, reference being had to the price originally paid by the exporter, and the expenses he has incurred."

Neutral Vessels Transporting Enemy's Forces.

Transporting the *Enemy's Forces*, subjects a Neutral Vessel to confiscation, if captured by the opposite belligerent. Sir Wm. Scott says, in the leading case on this subject— "That a vessel hired, by the enemy, for the conveyance of military persons is to be considered *as a transport*, subject to condemnation, has been in a recent case, held by this Court, and on other occasions.† What is the number of military persons that shall constitute such a case it may be difficult to define. In the former cases there were many, in the present they are fewer in number; number alone is an insignificant circumstance in the considerations on which

* The Haabet, 2 Rob. Adm. Rep. 182.

† The Carolina, Rob. Adm. Rep. vol. iv. p. 256.

the principles of law on this subject are built; since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To send out *one veteran general* of France to take command of the forces at Batavia might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and therefore it is what the belligerent has a stronger right to prevent and punish. In this instance the military persons are three,* and there are besides two other persons who were going to be employed in civil capacities in the Government of Batavia. * * It appears to me, *on principle*, to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, and at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with hostile operations.† The fact of the vessel having been pressed into the enemy's service does not exempt her. The master cannot aver that he was an involuntary agent."‡

Neutral Ships Carrying Enemy's Despatches.

Carrying the *Despatches of the Enemy* is also a ground of condemnation. "In the transmission of Despatches may be conveyed the entire plan of a campaign, that may defeat all the plans of the other belligerent, in the world. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character—as an act of the most hostile nature. The offence of *fraudulently* carrying despatches in the service of the enemy being greater than other contraband, some other penalty has to be affixed. The confiscation of the noxious article would be ridiculous when

* They were officers of distinction.

† The Orozembo, 1 Rob. Adm. Rep. p. 434.

‡ Idem.

applied to *Despatches.* There would be *no* freight dependent on their transportation. The *vehicle* (*i.e.* the ship) in which they are carried must, therefore, be forfeited." *

Ambassadors excepted.

The Despatches of an Ambassador or other Public Minister of the Enemy, resident in a neutral country, are an exception to this rule, being the despatches of persons who are in a peculiar manner the favourite object of the Law of Nations, residing in the neutral country for the purpose of preserving peace and the relations of amity between that state and their own government.

The ambassador of the enemy may be stopped on his passage, but when he has arrived in the neutral country, he becomes a sort of *middleman,* and is entitled to peculiar privileges.†

Penalty for Contraband Trade.

Under the present Law of Nations, a Contraband Cargo cannot affect the ship; the carrying of contraband articles is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with some malignant and aggravating circumstances.‡

Additional Penalties.

The aggravation of fraud justifies additional Penalties; thus, the carriage of contraband with a false destination, will work a condemnation of the ship as well as the cargo; the false destination being intended to defeat the right of pre-emption.§ Generally, *false* papers will extend the taint of contraband to the vessel.

* The Atalanta, Rob. Adm. Rep. vol. vi. p. 440.
† The Caroline, Rob. Adm. Rep. vol. vi. p. 461.
‡ The Ringende Jacob, Rob. Adm. Rep. vol. i. p. 90.
§ The Franklin, Rob. vol. iii, p. 125.

It is also an established rule, that the transfer of contraband by a neutral, from one port of a country to another, where it is required for the purposes of war, is subject to be treated in the same manner as an original importation into the country itself.*

Return Voyage Free.

Generally, the proceeds of the Return Voyage cannot be taken. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in actual prosecution of such a voyage, the penalty is not now generally held to attach.†

Section III.

Blockades. Right of Search. Convoys.

Blockades.

We now pass on to the subject of Blockade, which is the next exception to the general freedom of neutral commerce in time of war.

A blockade is a high act of Sovran authority; it cannot be assumed or exercised by a commander, without special authority, provided his Government is sufficiently near at hand to superintend and direct the course of operations; but a commander on a distant station is supposed to carry with him such a portion of the Sovran authority as may enable him to act with energy against the commerce of the enemy, as against the enemy himself‡

* The Rolla, 6 Rob. 366.

† The Edward, Rob. Adm. Rep. vol. iv. p. 70.

‡ The Tonina, Rob. Adm. Rep. vol. iii. p. 168.

Again, referring to Sir Wm. Scott's celebrated judgments, we find him saying, "That to constitute a violation of a state of blockade, three things must be proved: first, the existence of the blockade; secondly, the knowledge of it, in the party supposed to have offended; and thirdly, some act of violation, either by going in, or coming out with a cargo, laden after the commencement of the blockade."

First Rule of Blockade.

I. There is no rule of law more established than this; that the Breach of a Blockade subjects the property so employed to confiscation. Every man knows it; the subjects of all states know it.

A lawful maritime blockade requires the actual presence of a sufficient force stationed at the entrance of the port, sufficiently near to prevent communication.

The blockade is to be considered legally existing, although the winds may occassionally blow off the blockading squadron. It is an accidental change which must take place in every blockade; but the blockade is not therefore suspended.

This axiom is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and a mere fraud.*

When a blockading squadron is driven off by a superior force, the blockade is effectually raised, and it must be renewed by fresh notification, before foreign nations can be affected by an obligation to observe it as a blockade. The mere appearance of another squadron will not renew it, but it must be restored by the measures required for the original imposition of a blockade.†

Second Rule of Blockade.

It is necessary that the evidence of a blockade should be

* The Betsy, The Columbia, 1 Rob. Adm. Rep. pp. 92 and 155.

† The Hoffnung, 6 Rob. 120; see also The Triheton, 6 Rob. 65.

clear and decisive. A blockade may exist without a public declaration; although a declaration, unsupported by fact, will not be sufficient to establish it. In the War of 1798, the West India Islands were declared under blockade by Admiral Jervis; but the Lords of the Supreme Court held, that as the fact did not support the declaration, a blockade could not be deemed legally to exist. But the fact, on the contrary, duly notified on the spot, is of itself sufficient; for public notifications between governments are meant for the information of individuals; but if the individual is *personally* informed, that purpose is better obtained than by a public declaration.*

Where the vessel sails from a country lying near enough to the blockaded port to have constant information of the blockade, no notice is necessary of its continuance or relaxation; but when the country is at a distance beyond constant information, they may lawfully send their vessels on conjecture that the blockade is broken up, after it has existed a long time.† And this is important, as it must be remembered that even the *intention* to evade blockade is a fraudulent breach of it, and sailing towards the port is an *overt* act of that intent.‡

There are two kinds of Blockade. 1. Simple Blockade, *i.e.* Blockade in Fact; and 2nd., Blockade in Fact, accompanied by a Notification. The first expires by the breaking up *intentionally* of the blockading squadron. The second, *primâ facie*, does not expire until the repeal of the notification, but it is the duty of the belligerent country directly the blockade ceases, *de facto*, to revoke its proclamation. And it would appear that a notified blockade would only expire, in fact,

* The Mercurius, 1 Rob. Adm. Rep. p. 83.

† 2 Wheaton, p. 233, citing Rob. Adm. Rep.

‡ Rob. Adm. Rep. vol. i. p. 156.

after some unnecessary and long neglect to publish this revocation; otherwise neutral nations are bound until such publication.*

It has from time to time been stipulated, in treaties between belligerent and neutral countries, (as in the case of the Treaty between Great Britain and the United States, of 1794,) that vessels of the neutral country should not be considered as having notice of a blockade, until they have been duly and respectfully warned off; and it would only be on a second attempt to enter port that they would be liable to be seized. Under such a treaty a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded.†

Third Rule of Blockade.

An act of Violation is essential to a Breach of Blockade; such as, either going in or coming out of the port with a cargo, laden after the commencement of the blockade: or being found so near to the blockaded port as to show, beyond a doubt, that the vessel was endeavouring to run into it: or where the intention is expressly avowed by the papers found on board.‡

The time of shipment is very material; for although it may be hard to refuse a Neutral, liberty to retire with a cargo already laden, and by that act already become neutral property,—yet, after the commencement of a blockade, a neutral cannot be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of a blockade, a Neutral is no longer at liberty to make any purchase in that port.§

* Neptunus, Rob. Adm. Rep. vol. i. p. 171; Neptunus, Hempel. Rob. Adm. Rep. vol. ii. p. 112.

† 2 Wheaton, p. 239.

‡ 2 Wheaton, pp. 242, 244.

§ The Betsey, 1 Rob. Adm. Rep. p. 93.

A *Maritime* Blockade is not in law violated by bringing or sending goods to the port through the internal canal navigation or land carriage of the country; and thus such goods are not liable to confiscation on ground of the blockade.

Right of Search.

On the great question of the Right of Search, the International Law has been summed up by Lord Stowell, in the case of the *Maria*, where the exercise of the right was attempted to be resisted, by the interposition of a convoy of Swedish ships of war.*

First, the right of visiting and searching merchant ships on the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is the incontestible right of the lawfully commissioned cruizers of a belligerent nation.

Secondly, that the authority of the Sovran of the neutral country, being interposed in any manner of mere force, cannot legally vary the rights of a lawfully commissioned belligerent cruizer. It cannot be maintained, that if a Swedish commissioned cruizer, during the wars of his own country, has a right, by the Laws of Nations, to visit and examine neutral ships, the King of England, (being Neutral to Sweden,) is authorized by law to obstruct the exercise of that right with respect to the merchants' ships of his country.

Thirdly, that the penalty for the violent contravention of this right, is the confiscation of the property withheld from visitation and search.

The judgment of condemnation, pronounced in this case, was followed by the Treaty of Armed Neutrality entered into by the Baltic Powers to resist the Right of Search, in 1800,

* 1 Rob. Adm. Rep. p. 340.

which league was dissolved by the death of the Emperor Paul, and the points in controversy between those Powers and Great Britain were finally adjusted by the Convention of 5th of June, 1805.*

Convoys.

It now remains to say a few words on the subject of Convoy. Convoy is a ship or ships of war appointed by the Government, or by the Commander-in-Chief on a particular station, for the guard of merchant vessels bound to their destination. A warranty that the vessel shall sail with convoy, is very common in Policies of Insurance, and if not complied with, the Insurance becomes absolutely void.

This warranty to sail with convoy, does not mean that the vessel shall depart with convoy immediately from the lading port, but only from the place of rendezvous appointed for vessels bound from that port, and must be strictly and impartially maintained by force, to the uniform universal exclusion of all vessels not privileged by law.†

From many ports, and among others from the port of London, no convoy ever sails. It has therefore been held sufficient for a vessel bound from London to sail with convoy from the *Downs*, and even from *Spithead*, when there was no convoy appointed from the *Downs*. Neither does it require the vessel to sail with convoy bound to the precise place of her destination; but if the vessel sail with the only convoy appointed for vessels going to her place of destination, it is sufficient. It sometimes happens that the force first appointed, is to accompany the ships only for a part of their voyage, and to be succeeded by another; at other times a small force is detached from the main body to bring up to a particular point; if a vessel sail under the protection

* See Section iv. on Armed Neutralities.

† 1 Rob. Adm. Rep. p. 340.

of a vessel thus appointed or detached, the warranty is satisfied.

But this warranty requires not only that the vessel shall sail under the protection of the convoy, but also that she shall continue during its course under the same protection, unless prevented from so doing by tempest or other unavoidable accident, in which case, the master and owners will be excused, if the master does all that is in his power to keep with the convoy.

The merchantman must, before sailing, obtain or endeavour to obtain, the sailing orders issued by the convoying squadron. The value of a convoy appointed by Government arises in a great degree from its taking the ships under control, as well as under protection; but this control cannot be exercised except by means of sailing orders. Otherwise, the master could not learn the rendezvous in case of dispersion by a storm, or obey signals in case of attack.

The obligation to sail with convoy does not depend merely on special agreement; but, by act of parliament, a merchant cannot sail without a convoy, on a *foreign* voyage, unless previously licensed to do so.*

Section IV.

Armed Neutralities.

It is not improbable the course of events in the present war may make it not uninteresting to my readers to have some short account of the origin and meaning of *Armed Neutralities*, especially as the principles on which they were founded may again be open to discussion. The right to take

* 43 Geo. III. c. lvii. sec. 1; Abbot, on Shipping, pp. 353—356.

enemy's property on board neutral vessels has, in the present war, been waived by the Queen, in a declaration, dated Buckingham Palace, March 29th 1854. This is however tempered by a reservation of the right to search for contraband. Up to the present time the right to take enemy's goods on board a neutral vessel has in this country been steadily maintained; though in France it has been fluctuating; the interests of another commercial power became the origin of the extraordinary confederacies termed *Armed Neutralities.* At an early period it was an object of interest with Holland, a great commercial and navigating country, whose permanent policy was essentially pacific, to obtain a relaxation of the severe rules which had previously been observed in maritime warfare. The States General of the United Provinces having complained of the provisions in the French Ordinance of 1538, a treaty of commerce was concluded between France and the Republic in 1646, by which the law, as far as respected the capture and confiscation of neutral vessels for carrying enemy's property, was suspended; but it was found impossible to obtain, at that time, any relaxation as to the liability to capture of enemy's property in neutral vessels.

This latter concession, however, the United Provinces obtained from France by the treaty of alliance of 1662, and the commercial treaty signed at the same time with the peace, at Nimiguen, in 1671; confirmed by the treaty of Ryswick, in 1697. The maxim that *free ships* make *free goods* was coupled in these treaties with its correlative maxim, *enemy's ships* make *enemy's goods.*

The same concession was obtained by Holland from England in 1668 and 1674, as the price of an alliance between the two countries against the ambitious designs of Louis XIV.

In the subsequent war of 1756, a controversy arose between England and Holland, in which it was said, on the one hand, that England had violated the rights of neutral commerce; and on the other, that Holland had not fulfilled the guarantees under which those privileges had been granted.

Afterwards, when the American Revolution gave rise to a war between France and Great Britain, the latter power, instead of following the example of her enemy, (who had issued an ordinance prohibiting the seizure of neutral vessels, even when bound to or from enemy ports, unless carrying contraband,) issued an order in council, (March, 1780,) suspending the special stipulations respecting commerce and navigation contained in the Treaty of 1674.

This was the crisis of many complaints made by the neutral powers against Great Britain; and, in 1780, the Empress of Russia proclaimed the principles of the Baltic Code of Neutrality, and declared she would maintain them by *force of arms.*

This system of armed neutrality contained the following principles.

1. That commerce with the ports and roads of the enemy is free to neutral powers.

2. That the ship covers the cargo.

3. That those merchandizes only be considered as contraband, which are declared to be such by treaties with the belligerent powers, or with one of them.

4. That no place shall be considered as blockaded, till it is surrounded in such a manner by hostile ships that no person can enter it without manifest danger.

5. That these principles shall serve as a basis for decisions concerning the legality of prizes.

The principal powers of Europe, as Sweden, Denmark,

Prussia, Germany, Holland, France, Spain, Portugal, Naples, and also the United States, acceded to the Russian principles of neutrality.

The Court of London answered this declaration by appealing to "the principles generally acknowledged as the Law of Nations, being the only law between powers where no treaties subsist;" and to "the tenor of its different engagements with other powers, where those engagements had altered the primitive law by neutral stipulations, according to the will and convenience of the contracting parties."

England, being thus opposed to all the maritime world, was at this time obliged to smother her resentment; only simply expostulating with Russia. But the want of the consent of a power of such decided maritime superiority as that of Great Britain, was an insuperable obstacle to the success of the Baltic Conventional Law of Neutrality; and it was abandoned in 1793 by the naval powers of Europe, as not sanctioned by the existing law of nations, in every case in which the doctrines of that code did not rest upon positive compact.

During the protracted wars of the French Revolution, all the belligerent powers began by discarding in practice, not only the principles of the armed neutrality, but even the generally received maxims of international law by which neutral commerce in time of war had been previously regulated. France, on her part, revived the severity of her ancient prize code; decreeing not only the capture and condemnation of the goods of her enemies found on board neutral vessels, but even of the vessels themselves laden with goods of British growth, produce, and manufacture.

In 1801, principally in consequence of the doctrines of the British Admiralty Courts with regard to the right of search, great efforts were made by the Baltic powers to recal and

enforce the doctrines of the armed neutrality of 1780. This attempt is generally known as the Armed Neutrality of 1800, and was met, promptly overpowered, and the confederacy finally dissolved, by the naval power of England. Russia gave up the point, and by her convention with England of the 17th of June, 1801, expressly agreed, that enemy's property was not to be protected on board of neutral ships.* This settlement was ended by the death of the Emperor Paul.

* This account of armed neutralitles has been extracted principally from Kent's Commentaries, vol. i. pp. 126-7; Wheaton on International Law, vol. ii. pp. 165-184; Martens on Privateers, pp. 230-33.

There are also most excellent accounts of these celebrated confederacies to be found in the Annual Register, in volumes 23, (1780,) and 43, (1801,) in the portion called the Historical Chronicle.

APPENDIX TO PART I.

NOTE A.—*The Law of Reprisals.**

Reprisals by commission, or letters of marque and reprisal, granted to one or more injured persons, in the name and authority of the Sovereign, constitutes a case of "partial, or special reprisals," and is considered to be compatible with a state of peace, and was formerly permitted by the Law of Nations; though it may be doubted if such a rule would hold good now.* General reprisals upon the persons and property of the subjects of another nation are equivalent to open war. It is often the first step which is taken at the commencement of a public war, and may be considered as amounting to a declaration of hostilities, unless satisfaction is made by the offending state.

A stoppage or seizure (in other words, an embargo), must not be confounded with complete reprisals. When ships are seized for the purpose of obtaining satisfaction for a particular injury, or security against a possible event, that seizure is only an embargo. The vessels are preserved as long as there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and the reprisals are accomplished. In fact, that which was *embargo* becomes reprisals by the *act of confiscation*.†

In the words of Lord Stowell; "Upon property so detained

* This Note was originally intended to form part of the text, but was accidentally omitted.

† Le Louis.

‡ Vattel, book ii. chap. xviii. sec. 342.

the declaration of war is said to have a retroactive effect, and to render it liable to be considered as the property of enemies taken in time of war. The property is seized provisionally—an act hostile enough in the mere execution, but equivocal as to its effects, and liable to be varied by subsequent events, and by the conduct of the government, the property of whose subjects is so detained. Where the first seizure is equivocal, if the matter in dispute terminates in reconciliation, the seizure is converted into a mere civil embargo. This would be the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses a hostile character upon the original seizure. It is declared to be embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus* by which it was done, that it was done *hostili animo*, and is to be considered a hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities.*

The modern rule seems to be, that tangible property, belonging to an enemy, ought *not* to be *immediately confiscated*. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the *right* to confiscate, but does not of itself confiscate the property of an enemy.

Chancellor Kent expressly terms this species of hostility—a *reprisal*.† And Lord Mansfield says, that though foreign ports or harbours are not the high sea any more than the shore, yet numberless captures made there have been condemned as prize,‡ *i.e.* can be the subject of *reprisal*.

* The Boedes Lust, 5 Rob. Adm. Rep. p. 244.

† 1 Kent's Com. p. 60.

‡ Lind. *v.* Rodney, Dougl. Rep. p. 614. a.

NOTE B.—*War Bill Act.*

During the last war, the War Bill Act, 34 Geo. 3. c. 9, was passed as a measure of retaliation. It was passed in order to prevent the effect intended to be produced by an order of the French Government, compelling all merchants, bankers, and others, possessed of money, funded property, and effects, in different parts Europe, to declare all such property, that it might be taken by violence, and applied to the purposes of the war then carried on by the government of France against the greater part of Europe.

The principal sections relating to bills, prohibited any British subject, from and after March 1, 1794, from wilfully and knowingly in any manner paying or satisfying any bill of exchange, note, draught, obligation, or order for money, in part or in whole, which, since January 1, 1794, had been or at any time during the said war should be drawn, accepted, or indorsed, or in any manner sent from any part of the dominions of France, &c.; every person so offending to forfeit *double* the value, and the payment not to be effectual against any person who might otherwise have demanded the same; but the demands of all persons to remain, notwithstanding such payment, and notwithstanding such bills shall have been delivered up.

NOTE C.—*Rule of* 1756.

During the war of 1756, the French Government, finding the trade with their colonies cut off by the maritime superiority of Great Britain, relaxed the monopoly of that trade, and allowed the Dutch, then neutral, to carry on the commerce between the mother country and her colonies, under special licences or passes, granted for this particular purpose, excluding at the same time,

all other neutrals from the same trade. Many of their vessels were captured by the British cruizers.

The policy under which they were captured is called the "Rule of 1756;" and as, in the present war, its justice and propriety has already begun to be doubted, it may not be uninteresting to read the reasons upon which it was founded.

1. They were considered as part of the French navigation, having adopted this otherwise exclusive commerce, and acting in the character of French enemy in identifying themselves with that interest, in direct opposition to the belligerent interests and purposes of Great Britain.

2. Inasmuch as they were only carriers for the French, they were to be regarded as French transports, carrying national assistance to the enemy, and therefore to be condemned on the same principle as vessels carrying troops or despatches.

3. That the property they carried being from one part of the French empire to the other, was so completely identified with French interests as to take a hostile character.

4. When war comes it is necessary to shut some of the avenues of commerce, otherwise the belligerent rights could not be protected.

5. That the neutral ought not to have *through* and by means of the war, which is not his affair, that he has not in time of peace; and by natural justice he is only entitled to his accustomed trade. That any inconveniences he may suffer are quite balanced by the enlargement of his commerce; the trade of the belligerents is usually interrupted to a great degree, and falls into the lap of the neutral.*

6. That it is a direct assistance to the enemy, and an injury to the belligerent interests of the other country, to carry on for the enemy the commerce that she has lost by the pressure of the war,—rendering the efforts of the successful power nugatory.

* Lord Stowell argues the principles at length in the Immanuel, 2 Rob. Adm. Rep. 198, 100.

NOTE D.—*Articles that have been declared Contraband at various times.*

Gunpowder, arms, military equipments, and other things peculiarly adapted to military purposes.

Sail cloths, masts, anchors, pitch, tar, and hemp, universally contraband, even when destined to ports not of military equipment.

Cheeses, fit for naval use; such as Dutch cheeses, when exclusively used in French ships of war.

Rosin, tallow, and ship biscuits, if destined to ports of military or naval equipment.

Similarly, of Wines.

And ship timber, when so destined.

Ships of war, or ships adapted for such service, going to a port of the enemy for sale.

Copper in sheets, certified by government dockyard officers as fit for the sheathing of ships.

Brimstone, destined to a port of warlike equipment.

NOTE E.—*The Late Declarations.*

The first manifesto or declaration of war issued by the Queen, so far follows the ancient form, that it gives a justification of the war, but differs from it in the omission of a general command to all her subjects to commit hostilities on the enemy. By this command (in the ancient form), the subjects were in general ordered, not only to break off all intercouse with the enemy, but also to *attack* him. Custom interpreted this general order. It authorized, and even obliged every subject, of whatever rank, to secure the person and things belonging to the enemy when they

fell into his hands; but it did not invite the subjects to undertake any offensive expedition without a commission or particular order. The present manifesto simply proclaims that the Queen of England has taken up arms against Russia, that is, has declared "a state of war." The omission of an injunction to break off intercourse, and to exercise hostility, does not relieve the subject from his duty in that respect; for war may commence without any manifesto, and any official recognition of the "state of war" casts upon the subject his full duties under that condition of things. The ancient form has been judiciously allowed to drop, leading, as it might have done, to misconception on the part of her majesty's lieges.

The second manifesto has reference to regulations with respect to neutral commerce, and speaks for itself.

The third is as follows, and the references to the text will be sufficient to explain it.

DECLARATION.

Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an Ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to Her by the Law of Nations.

It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war,* and of preventing neutrals from bearing the enemy's dispatches,† and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.‡

* *Vide* section ii. chap. iii. Contraband of War.

† *Vide* p. 84.

‡ See section ii. chap. ii. Blockades.

But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.*

It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships,† and Her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

Westminster, March 28, 1854.

THE FOURTH DECLARATION.

At the Court at Buckingham Palace, the 29th day of March, 1854, Present, The Queen's Most Excellent Majesty in Council. Her Majesty having determined to afford active assistance to Her Ally, His Highness the Sultan of the Ottoman Empire, for the protection of his dominions against the encroachments and unprovoked aggression of His Imperial Majesty, the Emperor of all the Russias, Her Majesty, therefore, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, that general reprisals‡ be granted against the ships, vessels, and

* This is the doctrine *free ships free goods*, for the first time voluntarily adopted by this country, pp. 72, 74.

† According to Vattel, this belligerent right has no existence, and need not therefore be waived, as it could not legally be exercised; but see p. 73.

‡ This grant of general reprisals, though apparently limited in its address, (as to action in the war) to Her Majesty's fleets and ships, does not exclude non-commissioned captors from taking Russian ships, or goods when called upon *by necessity* to do so. For example, any of our armed merchantmen, who in the present war will not be allowed letters of marque, would be quite justified when beating off the enemy, in also making a capture if possible, and although her prize would become a *Droit of Admiralty*, the captor would be entitled to apply to the court for some compensation. The second part of this declaration is intended to proclaim

goods of the Emperor of all the Russias, and of his subjects or others inhabiting within any of his countries, territories, or dominions, *so that Her Majesty's fleets and ships* shall and may lawfully seize all ships, vessels, and goods, belonging to the Emperor of all the Russias, or his subjects, or others inhabiting within any of his countries, territories, or dominions, and bring the same to judgment in such Courts of Admiralty within Her Majesty's dominions, possessions, or colonies, as shall be duly commissionated to take cognizance thereof. And to that end Her Majesty's Advocate-General, with the Advocate of Her Majesty in Her Office of Admiralty, are forthwith to prepare the draft of a Commission, and present the same to Her Majesty at this Board, authorizing the Commissioners for executing the office of Lord High Admiral to will and require the High Court of Admiralty of England, and the Lieutenant and Judge of the said Court, his Surrogate or Surrogates, as also the several Courts of Admiralty within Her Majesty's dominions, which shall be duly commissionated to take cognizance of, and judicially proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods, that are or shall be taken, and to hear and determine the same; and, according to the Courts of Admiralty and the Law of Nations, to adjudge and condemn all such ships, vessels, and goods, as shall belong to the Emperor of all the Russias or his subjects, or to any others inhabiting within any of his countries, territories, or dominions; and they are likewise to prepare and lay before Her Majesty, at this Board, a Draft of such Instructions as may be proper to be sent to the said several Courts of Admiralty in Her Majesty's dominions, possessions, and colonies, for their guidance herein.

From the Court at Buckingham Palace, this twenty-ninth day of March, one thousand eight hundred and fifty-four.

the preliminary step to establishing the court of prize. The declarations with respect to the embargo laid upon Russian goods and ships in our ports require no comment.

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POSTSCRIPT.

Since the completion of the Second Edition of this work, two very important Orders in Council, (dated April 15th, 1854,) have been published. Before proceeding to explain the intended effect of these Orders, it will be well to state that the consent of *both* the Allies of England in this war is necessary to give full validity to the Orders.

It is a very old principle that, during a *conjoint* War, no subject of an ally can trade with the common enemy without liability to forfeiture, in the prize courts of the ally, of all his property engaged in such trade. This rule can be relaxed only by the permission of the allied nations, according to their mutual consent.*

Lord Stowell lays down the principle in much broader terms, thus—"It has happened, since the world has grown more commercial, that a practice has crept in of admitting particular relaxations; and if *one* state only is at war, no injury is committed to any other state. It is of no importance to other nations how much a *single* belligerent chooses to weaken and dilute his *own* rights; but it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one state shall not do anything to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with

* See pages 11 and 12.

the enemy, the consequence may be that it will supply aid and *comfort* to the enemy; especially if it is an enemy very materially depending on the resources of foreign commerce, which may be injurious to the prosecution of the common cause, *and the interests of its ally.* It should seem that it is not enough, therefore, to say that one state has allowed this practice to its own subjects; it should appear to be at least desirable, that it could be shown that the practice is of such a nature that it can in no way interfere with the common operations, or that it has the allowance of the confederate state."*

Trade with the enemy has always been held to be a direct interference with the common operations of the war, and indirect trade has been regarded with as much jealousy as direct trade. If Lord Stowell is to be trusted, this country cannot in any way waive its belligerent rights, without the consent of its ally; so that it is quite in the option of France at any time to withdraw its assent, or to modify it in terms, and thus bind English merchants to the terms of their assent.

The *intended* effect of these Orders is well described in the *Times*, of April 21st, 1854.

"The Order in Council of the 15th April, 1854, recites, in the first instance, Her Majesty's declaration made on the opening of the war; but it then goes on to enact not only that enemies' property laden on board neutral vessels shall not be seized, but that all neutral and friendly ships shall be permitted to import into Her Majesty's dominions, all goods and merchandizes whatsoever, and to export everything in like manner, except to blockaded ports, and except those articles which require a special permission as being contraband of war. But this liberty of trade is not

* The Neptunus, 6 Robinson's Adm. Rep. p. 406; also the Nayade, 4 Rob. p. 251.

confined to neutrals. It is further ordered, that, with the above exceptions only, British subjects shall have free leave to trade 'with all ports and places wherever situate,' save only that British ships are not permitted to enter the ports of the enemy. The effect of this Order is, therefore, to leave the trade of this country with neutrals, and even the indirect trade with Russia, in the same state it was in during peace, as far as the law of our courts maritime is concerned; and the doctrine of illegal trading with the enemy is at an end.* The restrictions henceforth to be imposed are solely those arising out of direct naval and military operations, such as blockade, and those which the enemy may think fit to lay upon British and French property. As far as we are concerned, except that British ships are not to enter Russian ports—which it is obvious that they could not do without incurring the risk of a forfeiture of their property and the imprisonment of their crews—the trade may be lawfully carried on in any manner which the ingenuity and enterprise of our merchants can devise. In order to facilitate the removal of British property from the ports of the Baltic and the White Sea, which were frozen up at the date of the Order of the 29th of March, further leave has been given to Russian vessels to come out of those ports, if not under blockade, until the 15th of May; as, in fact, it is only by taking up Russian ships that British property in those ports is likely to be removed, as neutrals will not enter them from fear of the blockade.

"It is not easy to convey to the mind of the mercantile classes of the present generation, who have had no practical experience of the state of war, the extent of the change which is thus effected in their favour. The vigilance of our cruisers and the acuteness of our lawyers were incessantly employed in all former contests in tracking out the faintest scent of enemy's property on board every vessel met on the seas. The character of enemy's property was regarded as an infection, and reprobated with all the terms orginally reserved for guilty practices. The mercantile ingenuity of the country, pressed by the increased demand and exorbitant prices of prohibited articles, was strained to evade by every species of fraud these prohibitions, and a warfare was

* Vide post.

carried on within our own courts of justice between the pitiless exactions of the laws of war and the irresistible impulse of the laws of trade. To allay, in some degree, the inconveniences of this system, and to provide by legal means some of those commodities which it was for the public interest to purchase, the English and French Governments were driven, even during the height of the Continental System, to the granting of licences. But here again fresh abuses of every kind arose. These licences were an authorized mode of evading that very prohibition which the belligerents conceived it to be for their interest to maintain. They conferred a monopoly on the holder of the licence, which enabled him to sell his cargo of French wines or French silks at a prohibition price; and the law books of the time are still full of the endless litigation and fraud to which these practices gave rise.

"From all these evils we trust that the Order in Council of the 15th April has permanently relieved us, and the change it is calculated to bring about in the state of war is not of inferior importance to that which marked the transition from Protection to Free Trade in the state of peace. The system of licences is at an end, for all the liberty of trade with the enemy which it is in the power of the Goverement to confer at all, is thus conferred at once, and indiscriminately upon all; and, unless the Russian Government find means to maintain a prohibitive system on their frontiers, we hope that the supply of raw material from that country will not be reduced to scarcity."

In addition, however, to this very lucid explanation, it may be added, that it might become necessary to grant licences to trade directly (with the consent of our allies) to the Russian ports.

That on the part of British vessels, the "entering or communicating with any port or place in the possession or occupation of the enemy, will place the English vessel in the position of an illegal trader, and that the vessel will then be liable to the same penalties as if this Order had not been published."

With respect to Contraband, it will have to be remembered that contraband *to* Russia will not be contraband to England, unless it is despatches, treasonable letters, enemy's forces, secret agents or spies. Neutral property on board an enemy's vessel is not generally liable to seizure, unless on an "armed vessel of force;" but even this, by the Order, seems to be protected. By the same Order, British property on Russian vessels is *not* protected. It is quite in the option of neutrals, or British vessels, to break any Russian blockade.

The renunciations in these Orders are a waiver only of certain parts of the Queen's belligerent rights, and in no way diminish the state of war between England and Russia. Notwithstanding these Orders, Russo-English partnerships are dissolved, contracts with the enemy invalid, and even though a free trade is permitted, an Englishman cannot draw a good bill on a Russian, and *vice-versâ*. All attempts to communicate with the enemy are still illegal. The Queen has not altered her belligerent rights, she merely declares that she will not put them into motion; but that does not alter, nor can she of her own authority alter, any part of the International Law, which also is a part of our common law. These, Orders, therefore, give no power to the enemy to sue or reside here, or to make a valid indorsement to any British subject. Insurances will become legal on cargoes that by these Orders may be imported.

(From the *Gazette* of Tuesday.)

At the Court of Windsor, the 15th day of April, 1854, present the Queen's Most Excellent Majesty in Council.

Whereas Her Majesty was graciously pleased, on the 28th day of March last, to issue her Royal declaration on the following terms—

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the Powers with whom she remains at peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rites appertaining to her by the Law of Nations.

"It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

"But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vesssel, unless it be contraband of war.*

"It is not her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships ;† and Her Majesty further declares that, being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers."

Now it is this day ordered, by and with the advice of her Privy Council, that all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in Her Majesty's dominions all goods and merchandize *whatsoever, to whomsoever the same may belong*,‡ and

* See page 74.

† See page 75.

‡ This allows free commerce in neutral bottoms to our ports, from Russia. It is difficult to see what is meant by "friendly flags." It cannot mean "a flag of the allies," for that would be giving our allies more than we take ourselves. It is, perhaps, intended to include powers that may not be friendly to Russia, but in that position to ourselves, without being allied to us.

to export from any port or place in her Majesty's dominions to any port not blockaded, any cargo or goods, not being contraband of war, or not requiring a special permission, *to whomsoever the same may belong.*

And Her Majesty is further pleased, by and with the advice of Her Privy Council, to order, and it is hereby further ordered, that, save and except only as aforesaid, *all the subjects of Her Majesty*, and the subjects or citizens of any neutral or friendly State, shall and may, during and notwithstanding the present hostilities with Russia, *freely trade** with all ports and places wheresoever situate, which shall not be in a state of blockade, save and except that no British vessel shall, under any circumstances whatsoever, either under or by virtue of this order, or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in the possession or occupation of Her Majesty's enemies.

And the Right Hon. the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, the Lord Warden of the Cinque Ports, and Her Majesty's Principal Secretary of State for War and the Colonies, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

At the Court at Windsor, the 15th day of April, 1854, present the Queen's Most Excellent Majesty in Council.

Whereas, by an Order of Her Majesty in Council, of the 29th of March last, it was, among other things, ordered, "that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded."

And whereas Her Majesty, by and with the advice of Her said

* Free trade by British vessels in enemy's property to ports not hostile.

Council, is now pleased to alter and extend such part of the said Order, it is hereby ordered, by and with such advice as aforesaid, as follows—that is to say, that any Russian merchant vessel which, prior to the 15th day of May, 1854, shall have sailed from any port of Russia situated either in or upon the shores or coasts of the Baltic Sea or of the White Sea, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such last-mentioned port or place and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And Her Majesty is pleased, by and with the advice aforesaid, further to order, and it is hereby further ordered, that in all other respects Her Majesty's aforesaid Order in Council, of the 29th day of March last, shall be and remain in full force, effect, and operation.

And the Right Hon. the Lords Commissioners of Her Majesty's Treasury, the Lords Commisioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

H. B. T.

8, SERJEANT'S INN,
22nd April, 1854.



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